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Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES, INCORPORATED, AMERICAN BARGE LINE COMPANY AND FEDERAL BARGE LINES, INC., APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

FILED JULY 13, 1955

JURISDICTION NOTED OCTOBER 10, 1955

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per diem about 8 cents. Adding the 44 cent unloading charge, the revenue to the barge line would be approximately $4.69, or 3.34 mills per gross ton.

As evidence of the reasonableness of the water rates, complainants show that joint barge-rail rates of $6.72 are maintained on sulphur from New Orleans and Baton Rouge, La. to Chicago, and Chicago Heights and South Chicago, Ill., and Dyer, East Chicago, Gary, Hammond, Hartsdale, and Indiana Harbor, Ind.; $4.60 from the same origins to East St. Louis and $7.85 to Mooar, Iowa. The all-rail rates from Port Sulphur and Galveston to all of those destinations are $9.184 except to East St. Louis where the rate is $8.736.

They also show joint barge-rail rates of $6.66 from Port Sulphur to Chicago Heights, Danville, Joliet, La Salle, and Streator, Ill., and $7.78 to Clinton and Dubuque, Iowa.

[fol. 27] American Barge Line's water distance is 1,208 [2] miles from Port Sulphur to East St. Louis. When this distance is used, its division from the Port Sulphur-Danville joint barge-rail rate earns 3.6 mills per gross-ton mile. American also maintains a rate on sulphur from Port Sulphur to Calvert, Ky., 1,094 miles, on the basis of 3.6 mills per gross-ton mile, and a rate to Joliet which earns 3.4 mills per gross-ton mile for a haul of 1,535 miles.

In *Sulphur from Port Sulphur, La., to Dubuque, Iowa*, 280 I. C. C. 593, an all-water barge rate on sulphur was found compensatory and just and reasonable. That rate produced revenues of 2.85 mills per gross ton-mile.

Defendants' evidence establishes that the rail rates are within the zone of reasonableness. The local rail rate on sulphur from East St. Louis to Danville, although now published specifically, was based upon an all-rail rate from East St. Louis to Joliet. That rate was originally established at a lower than maximum reasonable basis because of water competition. It originally was applied by intermediate application at Danville and later specifically published for application to Danville.

The general basis for rail rates on sulphur is 23.5 percent of first class in eastern territory and the maximum rea-

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[2] *Agent Roger's* I. C. C. 5.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 17, 1955

I

Notice is hereby given that Dixie Carriers, Inc., Coyle Lines Incorporated, American Barge Line Company, and Federal Barge Lines, Inc., the plaintiffs herein, hereby appeal to the Supreme Court of the United States from the final judgment dismissing the complaint, entered in this action on February 16, 1955.

Subsequent to the entry of final judgment, plaintiffs filed a Motion for New Trial, which motion was denied by order of court entered on March 28, 1955.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the certified transcript of Proceedings before the [fol. 2] Interstate Commerce Commission in its Docket No. 30731 introduced in evidence at the trial of this case.

III

The questions presented by this appeal are as to whether the Interstate Commerce Commission acted within its authority in dismissing a complaint of the plaintiffs relating

to through routes and joint rates on sulphur from Galveston, Texas, via East St. Louis, Illinois, to Danville, Illinois, via the routes of the plaintiffs to East St. Louis and thence via the routes of the railroads named as defendants in said complaint, i. e., The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, to Danville. Said complaint and the hearing had thereon presented to the Commission for decision an issue of discrimination between connecting lines under section 3(4) of the Interstate Commerce Act (49 U. S. C., section 3(4)). That issue arose because of the refusal of the said defendant railroads to maintain through routes and joint rates with the plaintiffs, while contemporaneously maintaining through routes and joint rates with connecting rail lines via East St. Louis under similar circumstances and conditions, and because said defendant railroads demand and assess their full local rate from East St. Louis to Danville on ex-barge sulphur while accepting out of their joint rates with connecting railroads a division thereof which is lower than said local rate.

The particular questions presented are:

1. Did the Commission correctly construe section 3(4) of the Interstate Commerce Act in holding that a division of a joint all-rail rate is not a "rate" or "charge" within the meaning of said section 3(4) of the Interstate Commerce Act?

2. In the absence of differentiating circumstances legally sufficient to excuse or to warrant the difference in treatment, does section 3(4) of the Interstate Commerce Act make unlawful the action of a railroad in participating with one [fols. 3-4] connecting carrier in through routes and joint rates and in refusing similar participation to another connecting carrier seeking to engage in the same through transportation?

3. Were the circumstances relied upon by the Commission as warranting a difference in treatment between the plaintiffs and the connecting lines with which the railroad defendants maintained through-routes and joint rates, legally sufficient for the purpose?

4. Is the challenged order of the Interstate Commerce

Commission supported by adequate findings and substantial evidence?

(S.) Nuel D. Belnap, Attorney for American Barge Line Company and Federal Barge Lines, Inc., One North La Salle Street, Chicago 2, Illinois. (S.) Donald Macleay, Attorney for Dixie Carriers, Inc. and Coyle Lines Incorporated, 1625 K Street, N. W., Washington 6, D. C.; E. V. Greenwood, Attorney for All Plaintiffs, Second National Bank Building, Houston 2, Texas.

[fols. 5-10] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

Filed 24 day of May, 1955. V. Bailey Thomas, Clerk, by W. Paul Harriss, Deputy.

[fol. 11] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. —

DIXIE CARRIERS, INC., Houston Texas; COYLE LINES INCORPORATED, New Orleans, Louisiana; American Barge Line Company, Jeffersonville, Indiana; Federal Barge Lines, Inc., St. Louis, Missouri, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT

(Equitable Relief Requested)

1. This complaint is brought against the United States and the Interstate Commerce Commission and the jurisdiction of this Court is conferred pursuant to 49 USC, sec-

Con 17(9); 28 USC, sections 1336, 1398, 2284 and 2321 to 2325, inclusive; and 5 USC, section 1009.

2. The plaintiffs above named, as more particularly described in paragraphs 3, 4, 5, 6, and 7 below, are common carriers by water, engaged in the transportation of general freight, including sulphur, in interstate commerce from and to various ports, including from Galveston, Texas, to East St. Louis, Illinois. Said plaintiffs are subject to part III of the Interstate Commerce Act (49 USC, sections 301 et seq.), are authorized by certificates issued by the Interstate Commerce Commission to engage in such transportation, and are connecting lines at East St. Louis, Illinois, of various railroads hereinafter named which are engaged in the transportation of property, including sulphur, over railroad routes from East St. Louis to Danville, Illinois.

[fol. 12] 3. Plaintiff, Dixie Carriers, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office at Houston, Texas.

4. Plaintiff, Coyle Lines, Incorporated, is a corporation organized and existing under the laws of the State of Delaware, with its principal office at New Orleans, Louisiana.

5. The barge routes of the plaintiffs named in paragraphs 3 and 4 above, as to the matters here involved, are via the Gulf Intracoastal Waterway from Galveston, Texas, to New Orleans, Louisiana, at which latter point they connect with the routes of plaintiffs American Barge Line Company and Federal Barge Lines, Inc.

6. Plaintiff, American Barge Line Company, is a corporation organized and existing under the laws of the State of Delaware, with its office at Jeffersonville, Indiana. The barge route of this plaintiff, as to matters here involved, is from Port Sulphur and New Orleans, Louisiana, to East St. Louis, Illinois. The said route of this plaintiff connects at New Orleans with the routes of plaintiffs Dixie Carriers, Inc. and Coyle Lines, Incorporated.

7. Plaintiff, Federal Barge Lines, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office at St. Louis, Missouri. Federal Barge Lines, Inc. is successor in interest to Inland Waterways Corporation (a corporation created by and existing under an Act of the Congress of the United States—Act of June 3, 1924; Title 49, Sections 151-157, USC), pur-

suant to the orders of the Interstate Commerce Commission of September 14, 1953, and December 3, 1953, in its Finance Docket No. 18261, entitled *Federal Barge Lines, Inc., Purchase, Etc.* References herein to plaintiffs in connection with proceedings before the Interstate Commerce Commission embrace Federal Barge Lines, Inc., as successor [fol. 13] in interest to Inland Waterways Corporation. The barge route of this plaintiff, as to matters here involved, is from Port Sulphur and New Orleans, Louisiana, to East St. Louis, Illinois. The said route of this plaintiff connects at New Orleans with the routes of plaintiffs Dixie Carriers, Inc. and Coyle Lines, Incorporated.

8. This complaint is brought to set aside and annul the reports and orders entered by the Interstate Commerce Commission (hereinafter referred to as the Commission) in a proceeding before it known as Docket No. 30731, *American Barge Line Company, et al. v. Chicago & Eastern Illinois Railroad Company, et al.* Copies of the reports and orders entered by the Commission in said proceeding are attached as Exhibits C and D hereto and made a part hereof.

9. On or about December 13, 1950, plaintiffs herein filed with the Commission their joint complaint known upon the records of the Commission as Docket No. 30731, *American Barge Line Company, et al.* v. *Chicago & Eastern Illinois Railroad Company, et al.* A true and correct copy of said complaint is attached hereto as Exhibit A and made a part hereof.

10. Railroads operating routes from their connections with plaintiffs at East St. Louis, Illinois, to Danville, Illinois, such railroads including the Chicago & Eastern Illinois Railroad Company, New York Central Railroad Company, Wabash Railway Company, and Illinois Terminal Railroad Company, were named as defendants in the complaint. In said complaint plaintiffs alleged in substance that the said defendants discriminated against them in their charges for [fol. 14] transportation in violation of Section 3(4)* of the

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*Section 3(4) of the Act provides as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the in-

Interstate Commerce Act (49 USC, Section 3(4), by reason of the failure and refusal of said defendants to join with plaintiffs in a joint through barge-and-rail rate on sulphur from Galveston, Texas, to Danville, Illinois, to apply over the barge routes of plaintiffs from Galveston, Texas, to East St. Louis, and thence over the rail routes of defendants to Danville, while contemporaneously joining connecting rail lines operating from Galveston, Texas, to East St. Louis in joint through rates over through all-rail routes maintained by said defendants with said connecting railroads. Answers to said complaint were duly filed by the defendants named in said complaint.

11. Thereafter a hearing was had before an Examiner designated by the Commission, and the said Examiner issued his Proposed Report (attached hereto as Exhibit B, and made a part hereof), in which he held, among other things, that the Commission should find that the defendants, by accepting less than their local rate on sulphur when interchanged to them by rail connections at East St. Louis for movement to Danville, while charging their full local rate on sulphur when interchanged to them from plaintiffs for movement to Danville, constitutes discrimination between defendants' connecting carriers in violation of Section 3(4) of the Interstate Commerce Act.

[fol. 15] 12. Exceptions to the said Proposed Report of the Examiner, and replies thereto, were filed, and thereafter the matter was argued orally before Division 3 of the Commission. Under date of December 22, 1952, the Commission, Division 3, handed down a report and order, contrary to the

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terchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

recommendation of the Examiner, dismissing the complaint of the plaintiffs; one of the three members of the Division dissenting in a separate opinion. That report and order, with the dissenting opinion, is reported at 287 I. C. C. 403, and is attached hereto as Exhibit C, and made a part hereof. Thereafter, plaintiffs filed with the Commission their petition for reconsideration and reargument, and defendants replied thereto. By its order of May 18, 1953, the Commission reopened the said proceeding for oral argument, which was had before the Entire Commission. Under date of January 19, 1954, the E re Commission handed down its report and order on reconsideration, in which it affirmed the dismissal of the complaint by Division 3; three members of the Commission dissenting in a separate opinion. The said report and order on reconsideration, with the dissenting opinion, is attached hereto as Exhibit D, and made a part hereof. Thereafter, on February 15, 1954, the Secretary of the Commission issued a notice to the public of a modification in the dissenting separate opinion, and the said notice is attached hereto as Exhibit E, and made a part hereof.

13. The evidence taken at the hearing before the Commission in the proceeding above described showed that the defendants in the proceeding before the Commission refuse to participate with plaintiffs in the through movement of sulphur via the lines of the plaintiffs to East St. Louis and thence the lines of the defendants to Danville for any rate or charge for the rail portion of the through movement less than $2.95 per gross ton of 2,240 pounds, said rate and charge being the local rate of said defendants applicable upon sulphur in carloads originating at East St. Louis and [fol. 16] destined to Danville, and upon sulphur received by said defendants from connecting lines at East St. Louis for further transportation to delivery at Danville whenever said defendants maintain no joint through rates with connecting carriers from whom such sulphur is received. The evidence before the Commission further showed that the defendant railroads participate in the through movement of sulphur in carloads over all-rail routes from Galveston via East St. Louis to Danville, and accept out of the through rate maintained over those all-rail routes, as a charge or

compensation for their services from East St. Louis to Danville, a lesser amount than their said local rate of $2.95 per gross ton. The evidence before the Commission further showed that said defendant railroads in the proceeding before the Commission participate with the plaintiffs, American Barge Line Company and Inland Waterways Corporation (predecessor of Federal Barge Lines, Inc.) in joint through barge-and-rail rates on sulphur from Port Sulphur, Louisiana, via East St. Louis to Danville, Illinois, and that the said defendant railroads in the proceeding before the Commission accept out of said through barge-and-rail rates on sulphur from Port Sulphur a compensation or charge in the amount of $2.26 per gross ton.

14. The reports and orders of the Commission dismissing the complaint of the plaintiffs hereinabove described are capricious, arbitrary, erroneous, without rational basis, beyond the power of the Commission to enter, and in violation of the provisions of Part I of the Interstate Commerce Act (49 USC, section 1 et seq.) as administered and enforced with a view to carrying out the National Transportation Policy (49 USC, Note preceding section 1), and are contrary to the requirements of the Administrative Procedure Act (5 USC, section 1001 et sec.). The ultimate conclusions in said report are not supported by adequate findings and the said ultimate conclusions and the findings which the report does contain are not supported by substantial evidence and are contrary to the evidence. Said ultimate con-
[fol. 17] clusions in said report dismissing the plaintiffs' complaint rest upon a misconstruction and misapplication of section 3(4) of the Interstate Commerce Act (49 USC, section 3(4)) to the facts of the case as disclosed by the evidence in the record before the Commission.

15. Plaintiffs offer to prove all of the matters hereinbefore alleged and to establish that they have no plain, speedy or adequate remedy at law protecting their rights from the disastrous effects of the decisions, reports and orders of the Commission hereinabove described, which are subjecting them to irreparable loss and damage.

Wherefore, plaintiffs respectfully pray:

(a) That, as provided by Rule 4 of the Federal Rules of Civil Procedure, a summons issue immediately out of and

under the seal of this Court and be directed to the defendants above named, requiring said defendants, on a day certain therein to be specified, to be and appear before this Court and answer this complaint, but not under oath, answer under oath being expressly waived;

(b) That, as provided by Section 2284(1) of Title 28, U. S. C., the Judge of this Court to whom this complaint is presented, notify the Chief Judge of this Circuit who shall designate two other Judges, at least one of whom shall be a Circuit Judge, to serve, together with said Judge of this Court, as members of the Court to hear and determine this action;

(c) That upon the final hearing of this action, the Court so constituted enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of said Commission; that this Court construe the statutes involved and determine and state the correct principles of law controlling the disposition of said complaint before the Commission, and determine the jurisdiction of the Commission in the premises; and that this Court thereupon remand said complaint to the Commission for further proceedings in [fols. 18-23] accordance with the controlling principles determined by this Court, or find and determine that plaintiffs are entitled to further consideration of their complaint before the Commission by the Commission and a decision thereon not inconsistent with the decision of this Court;

(d) That plaintiffs have such other and further relief in the premises as may be lawful and as may be deemed by this Court to be fit and proper.

Donald Macleay, Commonwealth Building, Washington 6, D. C., Attorney for Plaintiffs Dixie Carriers, Inc., Coyle Lines Incorporated. Nuel D. Belnap, Field Building, Chicago 3, Illinois, Attorney for Plaintiffs American Barge Line Company, Federal Barge Lines, Inc. (S.) E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorney for all Plaintiffs.

Of Counsel: Macleay and Lynch, Commonwealth Building, Washington 6, D. C.; Walter, Burchmore and Belnap, Field Building, Chicago 3, Illinois; Fulbright, Crooker,

Freeman, Bates and Jaworski, Second National Bank Building, Houston 2, Texas.

[fol. 24] EXHIBIT "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 30731

AMERICAN BARGE LINE COMPANY ET AL.,

v.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY ET AL.

Submitted Decided

1. Combination barge-rail rate on sulphur from Galveston, Texas, to Danville, Ill., over barge-rail route through East St. Louis, Ill., found unreasonable. Reasonable rate determined.

2. Lower division of joint through rate accepted by defendants for movement of sulphur from East St. Louis to Danville on ex-rail traffic than their local rate for similar movement ex-barge found to constitute discrimination between defendants' connecting carriers in violation of section 3(4) of the act. Appropriate order entered.

Nuel D. Belnap, John S. Burchmore, Robert N. Burchmore, Donald Macleay, and *Wesley A. Rogers* for complainants.

F. G. Robinson and *E. H. Thornton* for interveners supporting complainants.

Leo P. Day and *J. F. McWilliams* for defendants.

Report Proposed by Andrew C. Wilkins, Examiner

By complaint filed December 13, 1950, complainants allege that rates[1] and charges on sulphur over barge and rail routes from Galveston, Texas, through East St. Louis, Ill.,

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[1] Rates and differences in rates are stated in this report in amounts per ton of 2,240 pounds as of March 14, 1951.

to Danville, Ill., are excessive and unreasonable; that it is necessary or desirable in the public interest to establish through barge-rail routes and joint through rates with reasonable differentials under the all-rail rates; and that defendants' failure to establish and maintain such through barge-rail routes and joint barge-rail rates thereover is discriminatory against complainants as connecting carriers. The Commission is requested to prescribe through routes and joint rates.

The Galveston Chamber of Commerce was permitted to intervene and was represented at the hearing but did not otherwise participate in the proceeding. The allegation concerning the necessity or desirability in the public interest to establish through barge-rail routes was abandoned.

[fol. 25] The complainants, certificated carriers by water are (1) the American Barge Line Company and the Inland Waterways Corporation operating Federal Barge Lines (hereinafter referred to as Federal), which render common-carrier barge service on the Mississippi River and serve, among other ports, those of Port Sulphur and New Orleans, La., on the one hand, and East St. Louis, on the other; and (2) Coyle Lines, Incorporated, and Dixie Carriers, Inc., which operate common-carrier barge service from Galveston and points in the surrounding area to New Orleans. These latter Intracoastal Canal carriers join with the carriers rendering service on the Mississippi River in the publication of through routes and joint barge rates on sulphur from Galveston to East St. Louis. The distances from Galveston by water are 357 miles to New Orleans and 1,406 miles to East St. Louis.

The defendants provide single-line rail service from East St. Louis to Danville, and they participate with other rail carriers in joint-line rail service from Galveston and southeastern Texas sulphur mines to Danville. The short tariff route from Galveston is over the lines of the Texas and New Orleans Railroad Company to Shreveport, La., The Texas and Pacific Railway Company to Texarkana, Ark., Missouri Pacific Railroad Company (Guy A. Thompson, Trustee) to East St. Louis and Wabash Railroad Company beyond to Danville. The distances over that route from

Galveston are 850 miles to East St. Louis and 1,034 miles to Danville. Between the two points last named the distance is 184 miles.

The volume of the sulphur movement from the mines in the Galveston area to Danville approximates 20,000 tons a year. There has been no movement on the assailed barge-rail combination rate. During the last 6 months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by barge to East St. Louis and rail beyond. That movement, however, was by a contract water carrier which has since discontinued operation. The traffic is now moving over all-rail routes from the mines in the interior of Texas to destination, and the all-rail rate from the mines is the same as that from Galveston.

The price of sulphur at Galveston is $1.50 a ton higher when loaded in barges than when loaded in rail cars at the mines. This higher rate reflects, in part, the rail rate of $1.10 from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental.

There are no joint barge-rail rates in effect from Galveston to Danville or any other point. The barge-rail rates apply from "in barge" at Galveston and do not include the rail rate or other charges from the mines to "in barge." The rate from Galveston to Danville is a combination rate of $8.27, composed of the complainants' joint barge rate of $5.32 to East St. Louis, subject to a minimum of 1,500 tons, and the defendants' local interstate rail rate of $2.95, carload minimum 89,600 pounds, beyond. The barge lines do not absorb any portion of the cost of transporting the sulphur from the mines to, and loading it in, the barges at Galveston. From the joint barge rate of $5.32 the barge lines do absorb the cost of switching the loaded cars from the barge terminal at East St. Louis. The switching charge approximates 30 cents a ton and the per diem and reclaim charges average about 15 cents a ton. The charge for unloading the barges at the barge.

[fol. 26] Joint barge-rail rates have been in effect on sulphur on traffic from New Orleans since 1930. At that time sulphur moved in coastwise steamers from Galveston to

New Orleans where it was transferred to barges, moved upstream to East St. Louis by barge and transferred to rail cars for movement to Chicago. The traffic was handled on combination rates to and from New Orleans. Since that time other destinations in Illinois and Indiana have been added as destinations to which joint rates now apply. After the initial joint rates were published, joint barge-rail rates were published for application on sulphur from Port Sulphur to Joliet and a few other destinations in Illinois. Before September 22, 1949, the rate from Port Sulphur to Joliet applied by intermediate application at Danville over the lines of the Chicago & Eastern Illinois and the New York Central Railroad Companies. The other defendants requested inclusion in a joint rate published for specific application from Port Sulphur to Danville and the rate from Port Sulphur to Joliet became applicable at Danville by specific publication.

The complainants publish joint barge rates from Galveston to East St. Louis and other up-river ports with interchange arrangements at New Orleans. Port Sulphur and New Orleans are grouped for rate purposes. The joint barge rates from Galveston are made $1.01 higher than those from New Orleans.

Under the present barge rate from Galveston to East St. Louis the barge line bears no portion of the cost of transporting to and loading sulphur in barges at Galveston. From the joint barge rate the barge line absorbs the cost of switching the loaded cars from the barge terminal at East St. Louis. The switching approximates 30 cents a gross ton and the per diem and reclaim charges average about fifteen cents a gross ton. The unloading charges are 44 cents a gross ton at the barge terminal in East St. Louis. The tariff is silent concerning absorption of the unloading charges. The barge lines are willing to absorb those charges. The $5.32 rate produces revenue of 3.78 mills a gross ton mile. Under the sought rate, $7.67, and predicated upon a rail division of $2.26 (the rail division of the $6.66 Port Sulphur-Danville rate) the barge division would be $5.41 which would earn revenue of 3.84 mills per gross ton-mile. On a joint through barge-mile rate, the switching charge would approximate 20 cents per gross ton and

sonable basis for rates on sulphur from the southwest to the east is column 13.5. See *Marion Mfg. Co.* v. *Akron, C. & Y. R. Co.*, 274 I.C.C. 493. The current all-rail rate is 8.6 percent of the current first class (exceptions) rate from Texas producing points to Danville. The East St. Louis—Danville rate is 9.2 percent of first class. These facts indicate that the rail rates are not unreasonable.

The barge factor of the present combination of rates is within the zone of reasonableness for the service rendered. The rail factor, measured by the available criteria, is also within the zone of reasonableness for the local transportation of sulphur from East St. Louis. Yet the combination of the factors is sufficiently high to foreclose commercial use of the barge-rail route. The end result flows from the fact that the through all-rail rate is itself depressed because of the efforts of the rail carriers to hold the sulphur traffic to rails.

In section 307(d) the Commission is empowered to establish joint rates applicable to the transportation of property by common carriers by water and by railroad and prescribe such reasonable differentials as it may find to be justified between all rail rates and the joint rates in connection with such common carriers by water. In *Rail and Barge Joint Rates*, 270 I. C. C. 591, 613, after a review of the legislative history of the above section and Congressional policy with respect to water transportation on the Mississippi River it was concluded that joint barge-rail routes and rates generally are necessary and desirable in the public interest and that differentials between such rates and all rail rates are justified.

[fol. 28] It is the common law as well as statutory duty of common carriers by water and by rail to establish reasonable through routes. Such a through barge-rail route now exists for the transportation of sulphur from Galveston through East St. Louis to Danville. It is commercially a closed route because the combination of rates are now above the level at which the traffic will move over that route. The law also requires that the rates, fares and charges over through routes be just and reasonable. The barge factor of the combination of rates is not unduly high and appears to be reasonable. Similarly, the rail factor of the

combination, when considered separately, is within the zone of reasonableness.

It does not follow, however, as a matter of law, that the through rate is reasonable merely because the factors of the combination, when considered separately are themselves reasonable for the movement of the traffic between the points for which the separate rates have application. See *American Tar Products Co.* v. *Alabama G. S. R. Co.*, 160 I. C. C. 651, 655; 179 I. C. C. 366; 192 I. C. C. 703. This is particularly true of joint water-rail traffic. The Commission's "authority to require joint water-rail rates differentially lower than the corresponding all-rail rates is not limited to situations in which the all-rail rates are on a maximum reasonable basis." *Application of Inland Nav. Co.*, 218 I. C. C. 393, 402. This is necessarily so. Otherwise, the railroads, by reducing rates could drive the barge lines out of business. The problem, then, is one of relative reasonableness of the assailed barge-rail combination.

The argument under section 3(4) of the act is that the defendants refuse to join in the barge-rail transportation of sulphur from Galveston to Danville on any other basis than the full local rate of $2.95 while rendering similar transportation service if the traffic is taken from rail lines at East St. Louis for which the defendants receive a division less than $2.95 per ton. The defendants participate in a joint barge-rail rate on sulphur from Port Sulphur to Danville and their division of that rate is $2.26.

The general rule is that divisions of joint through rates are not a test of the lawfulness of separately established rates. See *Bituminous Coal to Youngstown*, 163 I. C. C. 3, 12 and *Ashland Coal & Ice Co.* v. *Atlantic Coast Line R. Co.*, 241 I. C. C. 120, 132. The reasons advanced for the rule are that many factors enter into the determination of divisions of rates among participating carriers which factors are not relevant or material in the determination of the lawfulness of rates. Another rule of widespread application is that the shipper has no interest in the divisions of joint through rates. See *L. & N. R. R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217. Here the rationale is that the question is the reasonableness of the through rate and not the way in which the revenue is divided or appor-

tioned among the carriers. These principles, however, revolve around the shipper carrier relation. A different situation is presented when the problem is between carriers. This clearly occurs when the relief sought is the prescription of divisions under section 15(6) where the Act makes provision for the prescription of divisions of joint rates, fares or charges. In section 3(4) the provision is that "All carriers subject to the provisions of this part [fol. 29] * * * shall not discriminate in their rates, fares, and charges between connecting lines * * *." Connecting lines by proviso include any common carrier by water subject to part III. Here the act is silent as to divisions. As this portion of the act was construed in *I. C. C.* v. *Mechling*, 330 U. S. 567, it means that the defendants are prohibited from charging more for the transportation of sulphur from East St. Louis to Dainville when the traffic is received from the barge lines than when the traffic is received from the rail connections at East St. Louis. The question then, is whether, in the instant case, a division of a rail joint rate is a charge within the meaning of the words "rates, fares, and charges" as used in section 3(4) of the act. In *Rates on Railroad Fuel and Other Coal*, 36 I. C. C. 1, at 13, it was stated "* * * the divisions applicable on fuel coal traffic are, in effect, rates, and there is good reason why they should be published by filing with the Commission and open to public inspection." A similar conclusion was reached in the *Tap Line case*, 31 I. C. C. 490. In those instances, the rail carriers were also the interested shippers. In somewhat different circumstances, it was found that, where the dispute arose between carriers, divisions were the cause of discrimination. In *Western Pacific R. R. Co.* v. *Southern Pacific Co.*, 55 I. C. C. 71, the Southern Pacific Company and the Atchison, Topeka & Santa Fe Railway Company maintained through routes and joint passenger fares from and to practically all points in California, and also participated in the same fares with the Western Pacific but the defendant lines made better divisions of those through fares between themselves than the divisions either carrier made with the complainant line. It was there alleged that the divisions caused discrimination under section 3 of the act. Defendants ad-

mitted the difference in divisions but contended that those differences did not constitute discrimination. At page 73 of that opinion it was stated "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory," and the following appears at page 81:

> We have said many times that ordinarily the passenger or shipper is not interested in the division of joint rates between carriers. It has appeared in many cases before us and is a matter of common knowledge that carriers frequently take advantage of their strategical position and demand divisions which fairly compensate them for surrendering a part of the line haul which they could perform. Carriers that are disadvantageously located are frequently willing to accord liberal divisions in order to be permitted to share in traffic to or from a point reached only by a competitor. It can not, however, be said that the carrier having the strategical advantage may lawfully accept from one of its connections a division which permits that competitor to share on fair and compensatory terms in the competitive traffic and at the same time demand from another connection for the same service in movement of the same competitive traffic a division so high as to make it impossible for it to share therein on a compensatory basis. In other words, if the carrier having the strategical advantage were to admit one competitor to share in the traffic and exclude another [fol. 30] by refusing to enter into any arrangement with it, or effect the same exclusion by exacting divisional arrangements which would prohibit participation by that connection in the traffic, the discrimination would be unlawful.

That situation appears to be comparable with that in the instant proceeding. In *Auckenbeck S. S. Co.* v. *Southern Ry. Co.*, 157 I. C. C. 752, the intercoastal steamship company contended that the rail carriers in the Southwest beyond New Orleans, La., should accord the ex-water traffic proportional rates to destinations in the Southwest equal to the divisions which the rail lines received on all-rail traffic

Louis, which would make the toal cost $4.32 per gross ton for moving sulphur by barge from Galveston to East St. Louis and delivering it to defendants at that point for movement to Danville. This may be contrasted with complainants' rate of $5.32, for local delivery, and $5.41, as a component of their proposed joint rate, to East St. Louis from [fol. 43] Galveston, and suggests the observation that if any reduction in the barge-rail charge from Galveston to Danville is needed it ought to come out of the barge factor and not out of the depressed rail factor.

Upon reconsideration, we find that the findings in the prior report should be, and they are, affirmed.

KNUDSON, Commissioner, dissenting:

I am in disagreement with the conclusion reached on the issue under section 3(4) of the act. The complaining barge lines are willing to absorb the charge for the transfer of the sulphur from the barge to the rails at East St. Louis, and there is here no serious contention that in other respects the circumstances affecting the transportation from East St. Louis to Danville are any different for the ex-barge than for the ex-rail traffic. It is true that the record fails to show the division of the joint all-rail rate received by the East St. Louis-Danville defendants, but it does show that on ex-barge traffic the division is less than the local rate from East St. Louis to Danville.

In *Interstate Commerce Commision* v. *Mechling*, 330 U. S. 567, the Supreme Court held that the provisions of section 3(4) as applied to the facts in that case meant "that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." Although on all-rail traffic the amount received by the East St. Louis-Danville lines is a division of the through charge, nevertheless it seems to me that the principle stated by the Supreme Court [fol. 44] has application. The cause for complaint lies in the fact that these lines demand the rate of $2.95 per long ton applying from East St. Louis locally to Danville on traffic

from the Pacific Coast. That contention was not sustained. It should be noted, however, that the question of discrimination between carriers was not considered on the ground that "that portion of section 3 which provides that carriers shall not discriminate in their rates, fares, and charges between connecting lines had application only to such connecting lines as were subject to regulation by us", citing *Capehart & Smith v. L. & N. R. R. Co.*, 4 I. C. C. 265. In the instant proceeding, the Commission has jurisdiction over the complainants under part III of the act.

Defendants urge that the circuity of the barge-rail route is a bar to the relief sought. They rely upon the decision in *Rail and Barge Joint Rates, supra*, where at page 609, certain restrictions were stated concerning circuity limitations used in the prescription of joint barge-rail rates. The limitation relied upon is that:

> "* * * no barge-rail route need be established where the short-line all-rail distance via the lines of said rail carriers from the point of origin to point of destination through the port of interchange with the barge line exceeds by more than 40 percent the shortest rail distance between such origin and destination."

The measure of that limitation is the percentage of circuity of the all-rail route from point of origin through the port of interchange to destination as compared with the short line all-rail route from origin to destination. Insofar as is material in this proceeding the origin of the traffic is Galveston and the port of interchange is East St. Louis. That limitation was designed to prevent wasteful transportation.

The short-line rail distances from Galveston are 823 miles to East St. Louis and 977 miles to Danville and the short tariff routes are 850 and 1,034 miles, respectively. Over one indirect east-bank route,[3] the rail distance is 1,339 miles.

These distances indicate that the rail carriers herein would perform no wasteful transportation. If the barge

[3] Southern Pacific to New Orleans, Illinois Central to East St. Louis and Wabash beyond.

lines are to participate in the traffic, they must use the only highway of commerce available to their form of transportation. From the evidence of record, it appears that the rate they propose will be remunerative for the service they would perform. The parties agree that the barge rate from Galveston to East St. Louis may be assumed to be reasonable. Under those circumstances, the relation of the [fol. 31] barge-rail route to the short-line all-rail route, constitutes no bar to the relief sought.

Defendants urge that relief should be denied herein because the complainants may handle sulphur by moving it in tows with not more than two other bulk commodities in which case the traffic would not be subject to regulation under the act and the complainants could handle the traffic without regard to published rates. By seeking a joint rate complainants subject themselves to the jurisdiction of this Commission with respect to the joint rates on this traffic.

In the sale of sulphur, it is the practice of the producers to sell the product produced in the Galveston area at the same price as that produced in the Port Sulphur area and to compete therewith, the Galveston producers absorb the difference between the transportation charges from the two producing areas. For this reason, complainants do not seek a large differential between the barge-rail rate here proposed and the present all-rail rate.

Defendants rely upon *Rail and Barge Joint Rates, supra*, (affirmed in *Alabama Great Southern R. Co. v. United States*, 340 U. S. 216) where at page 618 it was stated:

> Bulk commodities are largely handled in all-water service or on combination rates not under common arrangement for through carriage for the reason that quantities transported by barge must be larger than the ordinary carload in order to use the cargo-carrying space. Furthermore, interior points generally do not have facilities for handling such large consignments. For that reason, we shall not prescribe through routes and joint rates on bulk commodities.

That proceeding was broad in scope and included all through routes and joint rates between barge and rail lines on commodities generally. The instant proceeding relates to the through rate on one commodity from one origin to

one destination. It is true that bulk commodities are usually handled either in all-water service or on combination rates and that different minimum weights are required for barge and rail movement. The minimum weight problem is not an insurmountable obstacle because there are now published joint barge-rail rates on sulphur. The minimum weight provisions applicable on the Port Sulphur-Danville barge-rail rate should be used in the findings hereinafter made. In the instant proceeding, facilities exist at destination to handle barge load quantities of sulphur. The factual situations are different in the instant proceeding from those existing in the cited proceeding. There, the relief sought was the prescription of joint through routes while here the through route is in existence.

The Commission should find that the combination barge-rail rate applicable on sulphur from Galveston, interchanged to defendants at the port of East St. Louis to Danville is unreasonable to the extent that it exceeds $7.67, minimum weight 500 tons to East St. Louis and 80,000 pounds beyond; and that defendants, by accepting less than their local rate on sulphur, when interchanged with rail connections at East St. Louis for movement to Danville, while charging their full local rate on traffic interchanged to them from the complainants constitutes discrimination between defendants' connecting carriers in violation of Section 3(4) of the act.

An appropriate order should be entered.

[fol. 32] EXHIBIT "C" TO COMPLAINT

Interstate Commerce Commission

No. 30731.

AMERICAN BARGE LINE COMPANY, et al.

v.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, et al.

Submitted April 25, 1952. Decided December 22, 1952.

Combination barge-rail rate on sulphur from Galveston, Tex., to Danville, Ill., found not shown to be unreasonable

In my separate expression in connection with the prior report herein, I dissented also from the finding there made, and here affirmed, that the establishment of a joint barge-rail rate on this traffic was not shown to be necessary or desirable in the public interest. I am now satisfied that such a finding would not be needed if the relief which I would accord under section 3(4) of the Act were granted.

Commissioners Mahaffie and Alldredge authorize me to state that they join in this expression.

Commissioner Arpaia did not participate in the disposition of this proceeding.

By the Commission. George W. Laird, Secretary.
(Seal.)

[fols. 52-53] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE UNITED STATES—Filed May 27, 1954

Now comes the United States, a defendant herein, and, assuming a neutral position in the proceedings, for its answer to the complaint:

1. Admits the allegations of paragraph 1 of the complaint.

2. Neither admits nor denies any of the other allegations of the complaint.

(S.) James E. Kilday, (S.) Albert Parker, (S.) Maurice A. Fitzgerald, Special Assistants to the Attorney General, Attorneys for Defendant, United States of America.

Stanley N. Barnes, Assistant Attorney General, Malcolm R. Wilkey, United States Attorney, By (S.) C. B. Smith, Assistant United States Attorney.

or otherwise unlawful; establishment of a joint differential barge-rail rate on the same traffic found not shown to be necessary or desirable in the public interest; and allegation of discrimination under section 3 (4) of the act not sustained. Complaint dismissed.

Nuel D. Belnap, John S. Burchmore, Robert N. Burchmore, Donald Macleay, and Wesley A. Rogers for complainants. F. G. Robinson and E. H. Thornton, for interveners supporting complainants.

Leo P. Day and J. F. McWilliams for defendants.

Report of the Commission

Division 3, Commissioners Patterson, Johnson, and Kudson By Division 3:

Exceptions to the proposed report of the examiner were filed by the defendants and the complainants. The complainants replied to the defendants' exceptions. Our conclusions differ from those recommended by the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

By complaint filed December 13, 1950, the comp-i-ants allege that the rates [1] and charges on sulphur over barge-rail routes from Galveston, Tex., through East St. Louis, Ill., to Danville, Ill., are unreasonable; that it is necessary or desirable in the public interest to establish through barge-rail routes and joint through rates, with reasonable differentials under the all-rail rates; and that the defendants' failure to establish and maintain such through barge-rail routes and joint rates is discriminatory against the complaining barge lines as connecting carriers. We are asked to prescribe through rates and joint rates. The Galveston Chamber of Commerce was permitted to intervene, and was represented at the hearing but did not otherwise participate in the proceeding.

[fol. 33] The complainants, certificated water carriers, are

[1] Rates, rate differences, and charges are stated in this report in amounts per ton of 2,240 pounds, as of March 14, 1951.

American Barge Line Company and the Inland Waterways Corporation operating Federal Barge Lines (hereinafter referred to as Federal) which render common carrier barge service on the Mississippi River and serve, among other ports, those of Port Sulphur, La., and New Orleans, La., on the one hand, and East St. Louis, Ill., on the other, and Coyle Lines, Incorporated, and Dixie Carriers, Inc., which operate common carrier barge service from Galveston, Tex., and points in the surrounding area to New Orleans. The named Intracoastal Canal carriers join with the carriers which render service on the Mississippi River in the publication of through routes and joint barge rates on sulphur from Galveston to East St. Louis.

The defendants render single-line rail service from East St. Louis to Danville.

The present all-rail rate on sulphur from Galveston to Danville is $9.184 per gross ton.

The present rate for the barge-rail movement of sulphur from Galveston to Danville is $8.27 based upon a combination of factors of a joint barge rate of $5.32 from Galveston to East St. Louis, subject to 1,500 tons minimum and the local rail rate of $2.95 beyond, subject to C. L. minimum of 89,600 pounds. Complainants seek a joint through rate of $7.67. There are no joint barge-rail rates in effect from points in Texas to Danville or to other rail destinations in Illinois. There have never been any point barge-rail rates published for application on sulphur from Galveston to any point.

The water distance between Galveston and East St. Louis is 1,406 miles.

The price of sulphur at Galveston is $1.50 per ton higher when loaded in barges than when loaded in rail cars. That amount reflects, in part, charges of $1.10, the rail rate from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental. That difference has been recognized in recent proceedings. See *Sulphur from Louisiana and Texas to Clinton, Iowa*, 280 I.C.C. 789.

The present combination barge-rail rate is $5.32 plus $2.95 or $8.27. When the difference of $1.50 per ton is

added, the figure becomes $9.77. The $7.67 rate sought by complainants would result in rail-barge charge of $9.17. Under the present rates when shipped by barge, the rail-barge charges to the consignee are 58.6 cents higher than when shipped by rail. The $7.67 rate would produce charges of $9.17 or 1.4 cents lower than the charges for all rail movement.

There has been no movement on the assailed barge-rail combination rate. During the last 6 months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by barge to East St. Louis and rail beyond. This traffic was not handled by complainants but by a contract water carrier, which has now discontinued operation. At present the traffic is moving over all-rail routes from origin to destination.

* * * * * * *

[fol. 34] ——terminal in East St Louis is 44 cents a ton. The tariff is silent concerning absorption of the unloading charges; however, the barge lines are willing to absorb those charges. Based on the distance of 1,590 miles over the barge-rail route from Galveston to Danville, the rate of $8.27 yields 5.2 mills a gross-ton mile.

The all-rail rate on sulphur from Galveston and these south-eastern Texas mines, such as New Gulf, about 60 miles west of Galveston, to Danville is $9.184. Based on the rail short-tariff route distance of 1,034 miles from Galveston to Danville, that rate yields 8.8 mills a gross-ton mile. The general basis for rail rates on sulphur in eastern territory is 23.5 percent of first class, and a basis of column 13.5 from the Southwest to points in official territory was approved as not unreasonable in *Marion Mfg. Corp.* v. *Akron C. & Y. R. Co.*, 274 I. C. C. 493. The all-rail rate of $9.184 is 8.6 percent of the first-class (exceptions) rate from the Texas producing points to Danville, and the rail rate of $2.95 from East St. Louis to Danville is 9.2 percent of first class. It is apparent that these rail rates are on a depressed basis.

The complainants propose the establishment of a joint barge-rail rate of $7.67, to be divided $5.41 for the barge lines and $2.26 for the rail lines. Thus, the proposed barge

nies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report referred to and made a part of the complaint herein as Exhibit D.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, (S.) Samuel R. Howell, Assistant Chief Counsel.
(S.) Edward M. Reidy, Chief Counsel, Of Counsel.

[fol. 58] [Title omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[File endorsement omitted]

[Title omitted]

MOTION TO INTERVENE OF NEW YORK CENTRAL RAILROAD COMPANY, ET AL—Filed June 22, 1954

Now come the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and the Wabash Railroad Company and respectfully move the Court for leave to appear as Intervenors in support of the final order of the Interstate Commerce Commission in the above-entitled proceeding, and in support of said motion state as follows:

1. By the instant proceeding the plaintiffs contest the validity of the order of the Interstate Commerce Commission entered in a proceeding before the Commission in Docket No. 30731 styled as "American Barge Line Company, et al vs. Chicago & Eastern Illinois Railroad Company, et al."

2. That the petitioners were named as defendants in the plaintiffs' compiaint before the Interstate Commerce Commission and, as such, were parties in interest to those proceedings.

division of $5.41 exceeds the present barge rate from Galveston to East St. Louis by 9 cents. The proposed rate is for a loading of not less than the minimum for a bargeload to East St. Louis and the carload minimum beyond, apparently the same as applicable in connection with the present combination rate. The proposed rate was arrived at by adding $1.01 to the voluntarily-published joint barge-rail rate of $6.66 from Port Sulphur to Danville. The proposed $1.01 spread, Galveston over Port Sulphur, reflects the relation in rates from those origins in the all-water rate structure to destinations on the Mississippi River and on the Great Lakes. The complainants state that the divisions of the joint barge-rail rate of $6.66 from Port Sulphur to Danville are $4.40 for the barge lines and $2.26 for the rail lines. Based on the distance of 1,590 miles over the barge-rail route from Galveston to Danville, the proposed rate would yield 4.8 mills a gross-ton mile.

The complainants state that the proposed rate was requested by a shipper. No one testified at the hearing in behalf of any shipper. In comparing the cost, all-rail versus barge-rail, to the shipper, the greater price of the sulphur when loaded in barges, in the amount of $1.50, should be added to the proposed barge-rail rate, resulting in $9.17 a gross ton, as compared with $9.184 for transportation over the all-rail route.

In further support of their contention that the proposed joint barge-rail rate of $7.67 would be reasonable, the complainants compare it with joint barge-rail rates on sulphur from New Orleans and Baton Rouge, La., of $6.72 to Chicago, Ill., and certain other points in the Chicago district, $7.85 to Mooar, Iowa, and $4.60 to East St. Louis. They also show joint barge-rail rates on sulphur from Port Sulphur of $6.66 to Chicago Heights, Joliet, LaSalle, and Streator, Ill., and $7.78 to Clinton and Dubuque, Iowa. Those rates were voluntarily established and apply by barge to East St. Louis and rail beyond, except that the rate of [fol. 35] $4.60 to East St. Louis applies by barge to Cairo, Ill., and rail beyond. Unlike Danville, most of the destinations to which these joint barge-rail rates apply are served directly by barge in competition with all-rail and barge-rail routes.

3. Section 2323, Title 28.—Chapter 157 U.S. Code [62 Stat. 970] [63 Stat. 105] provides in part as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement, or any part thereof, and the interest of such party."

[fol. 59] Wherefore, the petitioners respectfully pray for leave to intervene in the above-entitled proceedings as Intervenors in support of the order of the Interstate Commerce Commission, and be represented by their counsel,

John A. Daily, 1225 LaSalle Street Station, Chicago 5, Illinois; Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Building, Houston, Texas, Attorneys for Intervenors.

Copies of this motion and the accompanying pleading have been mailed this June 22, 1954, to counsel for all parties.

Palmer Hutcheson, Jr.

[fol. 60] In the United States District Court for the Southern District of Texas, Houston Division

[Title omitted]

Answer of Intervenors in Support of the Order of the Interstate Commerce Commission

Now come the Intervenors, The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, and for their answer to the complaint and in support of the order of the Interstate Commerce Commission state as follows:

I

Deny that the plaintiffs are connecting lines at East St. Louis with these defendants, as alleged in Paragraph 2 of the complaint.

Section 307(d) of the Interstate Commerce Act reads, in pertinent part, as follows:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged * * *. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

Under the foregoing provisions of the act, we must prescribe joint rates for transportation partly by rail, and partly by water in instances where it is shown that such rates are necessary or desirable in the public interest. As stated, no shipper has evidenced an interest in the establishment of the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. The defendants urge that their participation in barge-rail routes as desired by complainants, is not shown to be necessary or desirable in the public interest.

This issues herein are similar to those in *Algonquin-Missouri Chemical Corp.* v. *Atchison, T. & S. F. Ry. Co.*, I. C. C. (No. 30792, decided June 20, 1952, mimeographed), wherein Division 3 found that the establishment of a joint differential barge-rail rate on sulphur from Port Sulphur to DeSoto, Kans., was not shown to be necessary or desirable in the public interest and that an allegation of discrimination under section 3(4) of the act had not been sustained. There, the existing all-rail rate was $8.74, the barge-rail rate was a combination composed of a barge rate of $5.10 to Kansas City, Mo., and a rail rate of $4.03 beyond, and the proposed joint barge-rail rate was $7.76 and would have yielded 5.1 mills per gross-ton mile for a distance of 1,522 miles.

The record before us does not warrant a finding that the

Company and the Wabash Railroad Company to intervene as parties herein, and the Court having considered said motion and the pleadings tendered therewith, and it appearing to the Court that the said The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company and the Wabash Railroad Company should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, that The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company and the Wabash Railroad Company and each of them have leave to intervene in this cause and each is hereby made a party to this cause and to that end may file a pleading in this cause in the same manner and with like effect as if named an original party to this cause.

(S.) Ben C. Connally, Judge.

Houston, Texas, June 22, 1954.

[fol. 65] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION TO INTERVENE OF AMERICAN WATERWAYS OPERATORS, INC.—November 3, 1954

Now comes the American Waterways Operators, Inc. and respectfully moves the Court for leave to appear as an Intervenor in support of Plaintiffs in the above-entitled proceeding and in support of said motion states as follows:

1. By the instant proceeding, the Plaintiffs protest the validity of the Order of the Interstate Commerce Commission entered in a proceeding before the Commission in Docket No. 30731 styled as "American Barge Line Com-

present through barge-rail rate is unreasonable or otherwise unlawful for the service offered thereunder, and affords no basis for a finding of unlawful discrimination under section 3(4) of the act.

In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy, which call for a fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition, to further depress their earnings on the traffic in order to favor that same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for that 184-mile haul is depressed at least [fol. 36] from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low.

We find that the establishment of a joint rate and through route as sought is not shown to be necessary or desirable in the public interest, and that the allegation under section 3(4) of the act has not been sustained. The complaint will be dismissed.

KNUDSON, *Commissioner*, dissenting:

The national transportation policy requires us to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the act so administered as to recognize and preserve the inherent advantages of each. All provisions of the Interstate Commerce Act are to be construed in the light of this policy. In the circumstances here presented, where the railroads depress their through rail rates from Galveston to Danville to meet and overcome barge competition and refuse to accord similar

treatment on ex barge traffic for the rail haul from St. Louis to Danville, this policy would be subjected to severe stress were we to continue to indorse this situation.

Sulphur is a commodity which readily lends itself to transportation by barge. It can be and is transported in barge load quantities. The time in transit is not of great importance and the nature of the commodity is such that its deteriorating effect upon the equipment used to transport it is probably less in the case of barge equipment than in the case of railroad equipment. In addition, the use of barges to transport a portion of this traffic will release needed rail equipment. There is no reason to believe that the establishment of joint barge-rail rates upon a proper basis will do more than allow the barge lines to obtain a share of this traffic. The foregoing factors are sufficient to show that the establishment of joint barge-rail rates are necessary and desirable in the public interest.

[fol. 37] ORDER

At a Session of the Interstate Commerce Commission, Division 3, Held at its Office in Washington, D. C., on the 22nd Day of December, A. D. 1952

No. 30731

AMERICAN BARGE LINE COMPANY et al.,

v.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY et al.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, division 3. George W. Laird, Acting Secretary. (Seal.)

pany, et al. vs. Chicago & Eastern Illinois Railroad Company, et al."

2. That the Petitioner was an intervenor in support of Plaintiffs' complaint before the Interstate Commerce Commission and as such was a party in interest to those proceedings.

3. Section 2323, Title 28.—Chapter 157 U. S. Code [62 Stat. 970] [63 Stat. 105] provides in part as follows:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before [fol. 66] the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

Wherefore, the Petitioner respectfully prays for leave to intervene in the above-entitled proceedings as an Intervenor in opposition to the Order of the Interstate Commerce Commission and be represented by their counsel.

John H. Eisenhart, Jr., 1319 F Street, N.W., Washington 4, D. C.; E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorneys for Intervenor.

Copies of this motion and the accompanying pleadings have been mailed this 3rd day of November, 1954 to counsel for all parties, or delivered in person, to counsel for each such party on such date.

E. V. Greenwood.

[fol. 67] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION—November 3, 1954

This cause coming on to be heard on the motion of the American Waterways Operators, Inc. to intervene as a

[fol. 38] EXHIBIT "D" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 30731

AMERICAN BARGE LINE COMPANY et al.,

v.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY et al.

Submitted November 4, 1953. Decided January 19, 1954

On reconsideration, combination barge-rail rate on sulphur from Galveston, Tex., to Danville, Ill., found not shown to be unreasonable; establishment of a joint barge-rail rate on the same traffic found not shown to be necessary or desirable in the public interest; and allegation of discrimination under section 3(4) of the act not sustained. Prior findings, 287 I. C. C. 403, affirmed.

Appearances as shown in prior report and in addition:

John H. Eisenhart for an intervener supporting complainants.

John A. Daily for defendants.

Report of the Commission on Reconsideration

By the COMMISSION:

In the prior report herein, 287 I. C. C. 403, decided December 22, 1952, division 3 found that the combination rate on sulphur by barge from Galveston, Tex., to East St. Louis, Ill., and thence by rail to Danville, Ill., was not shown to be unreasonable for the service offered thereunder, that the establishment of a joint differential barge-rail rate as sought was not shown to be necessary or desirable in the public interest, and that the allegation of discrimination against the complaining barge lines under section 3(4) of the Interstate Commerce Act had not been sustained. Upon complainants' petition and replies by defendants, the proceeding was reopened for reconsideration upon argument, which we have heard. The facts stated in the prior report will be repeated herein only to the extent necessary for a clear understanding of the issues.

party herein and the Court having considered said motion and the pleadings tendered therewith, and it appearing to the Court that the said American Waterways Operators, Inc. should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, that the American Waterways Operators, Inc. have leave to intervene in this cause and is hereby made a party to this cause and to that end may file a pleading in this cause in the same manner and with like effect as if named an original party to this cause. Subject to all legal objections.

(S.) Ben C. Connally, Judge.

11/3/54

[fol. 68] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERVENOR IN OPPOSITION TO THE ORDER OF THE INTERSTATE COMMERCE—COMMISSION—November 3, 1954

Now comes the Intervenor, the American Waterways Operators, Inc. and in support of the complaint and in opposition to the Order of the Interstate Commerce Commission states as follows:

1. That the American Waterways Operators, Inc. is a Delaware corporation which, under its Constitution and By-Laws has for its general purpose, the advancement of the general welfare of operators of small vessels throughout the United States.

2. That all the Plaintiffs in the instant proceeding are members of the American Waterways Operators, Inc. and at the request of Plaintiffs, the American Waterways Operators, Inc. intervened in and became a party to the complaint proceeding before the Interstate Commerce Commission upon leave duly granted by said Interstate Commerce Commission.

3. That the question of law involved in the instant proceeding, namely, the proper interpretation of Section 3(4)

[fol. 39] Single-line rail service is provided by defendants from East St. Louis to Danville, and they participate with other defendant rail carriers in joint-line rail service for the transportation of sulphur from Galveston, Tex., to Danville. Beginning with and since 1951, the entire movement of sulphur from the Galveston area, approximating 20,000 tons a year, has been over the all-rail routes. The all-rail rate from Galveston is $9.184 per ton.[1] The combination barge-rail rate from Galveston is $8.27, composed of $5.32 by barge to East St. Louis, minimum 1,500 gross tons, and the rate of $2.95 by rail from East St. Louis to Danville. The complainants suggest a joint barge-rail rate of $7.67 from Galveston, which is based upon a joint barge-rail rate of $6.66 from Port Sulphur, La., to Danville, plus $1.01, the usual difference between rates by barge from Galveston and from Louisiana ports. The barge lines would absorb the charges incident to the transfer to rail cars at East St. Louis.

As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1,514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent ad-[fol. 40] vantages of all modes of transportation. The complainants cite decisions in which such rate differences were prescribed, but the prescriptions were based upon a presentation of adequate evidence, which is not the case here.

The circumstances here, insofar as the establishment of a joint barge-rail rate is concerned, are in all respects similar to those in *Hanaquin-Missouri Chemical Corp. v. A. T. & S. F. Ry. Co.*, 286 I. C. C. 307, wherein division 3 found that the establishment of a joint rate and through route as

[1] Rates and rate differences stated herein are per ton of 2,240 pounds.

[fol. 69] of the Interstate Commerce Act, as amended is of interest to and concerns the general welfare of all of Intervenor's members which are operators of small vessels throughout the United States and which consist of approximately 210 in number.

4. That the interpretation placed by the Interstate Commerce Commission on Section 3(4) of the Interstate Commerce Act, as amended, is clearly erroneous and adversely affects the welfare of all members of your Intervenor, that if the interpretation based upon the aforesaid section by the Interstate Commerce Commission should prevail, all members of your Intervenor would be most seriously and adversely affected to the extent of, in all probability, driving out said water carriers from the business of transportation of property by water throughout the United States, which would be clearly inequitable. Finally, that unless the action of the Interstate Commerce Commission as taken in their report and order in the complaint case referred to herein is reversed by this honorable Court, Intervenors' members would be without any remedy whatsoever.

Wherefore, Intervenor respectfully prays that upon the final hearing of this action, the Court so constituted enter a decree permanently suspending, enjoining, setting aside and annulling the said orders of said Commission; that this Court construe the statutes involved and determine and state the correct principles of law controlling the disposition of said complaint before the Commission, and determine the jurisdiction of the Commission in the premises; and that this Court thereupon remand said complaint to the Commission for further proceedings in accordance with the controlling principles determined by this Court, or find and determine that plaintiffs are entitled to further [fol. 70] consideration of their complaint before the Commission by the Commission and a decision thereon not inconsistent with the decision of this Court;

That plaintiffs have such other and further relief in the premises as may be lawful and as may be deemed by this Court to be fit and proper.

John H. Eisenhart, Jr., 1319 F Street, N. W., Washington 4, D. C.; E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorneys for Intervenor:

there sought on sulphur from Port Sulphur, La., to De Sota, Kans., was not shown to be necessary or desirable in the public interest. The complainants there were the Inland Waterways Corporation, operating the Federal Barge Lines, and a shipper or receiver located at De Sota. Here, no shipper has evidenced an interest in the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. In these circumstances, we cannot find that the public interest requires the establishment of the joint barge-rail rate sought.

At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville, which is the amount received by them as a division of the joint barge-rail rate of $6.66 from Port Sulphur to Danville. He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct. The complaint in this respect is directed against the alleged discrimination in favor of rail lines serving Galveston and not Port Sulphur, and what the rail lines receive as their share of the rate from Port Sulphur is not helpful here. The amount received by the East St. Louis-Danville lines in the division of the all-rail [fol. 41] rate from Galveston is not shown, but even if it were shown, we do not think a finding of unlawful discrimination under section 3(4) could be supported on the facts presented. The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I. C. C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the

same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pacific R. Co.* v. *Southern Pac. Co., supra*, upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

The rail rate of $2.95 from East St. Louis to Danville, used as a component of the through combination barge-rail rate on complainants' traffic from Galveston to Danville, is also used for similar application on sulphur carried from [fol. 42] Galveston to East St. Louis by contract carriers by barge. It will also apply on sulphur moved to East St. Louis by rail carriers not parties to joint rates. The depressed character of this rate, originally established under intermediate application under the fourth section when the rail lines reduced their rate from East St. Louis to Joliet, Ill., to meet barge competition, as shown by its comparison with noncompetitive rail rates of from $4.70 to $5.80 for lesser hauls in the same general area. A proposal of defendants to further reduce the application of the same rate on traffic to Joliet, in an effort to meet further competition of the barge lines, was suspended upon protest of the barge lines, and was found not shown to be just and reasonable by division 2 in *Crude Sulphur From East St. Louis To Joliet*, 270 I. C. C. 231. Had that rate been permitted to become effective the rate from East St. Louis to Danville would now be approximately the same as the rail division of the Port Sulphur-Danville joint rate, but such a rate would then have been available to the traffic of all carriers not parties to joint rates, including traffic moved into East St. Louis by contract carriers by barge. Complainants show that their fully distributed cost for hauling sulphur by water for 1500 miles, the approximate water distance from Galveston to East St. Louis, is $4.03 per gross ton. Their witness estimated that it costs the barge lines about 29 cents to deliver the traffic to the rail lines at East St.

originating at New Gulf that may move from Galveston to East St. Louis by barge, although they receive a division, which it must be assumed is less than $2.95, of the joint all-rail rate on traffic for the same destination moving from New Gulf to East St. Louis by rail. Such a difference between the amounts received or demanded for the transportation beyond East St. Louis could have justification only if a substantial difference in the amount or character of the service beyond East St. Louis were shown. No such a showing has here been made. The evidence is to the contrary.

Section 3(4) of the act, among other things, prohibits carriers subject to part I of the act from discriminating "in their rates, fares, and charges between connecting lines," and the term "connecting lines" is therein defined as including common carriers by water subject to part III of the act. Complainants here are such common carriers. As stated in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I. C. C. 71, 81, "Wherever and whenever the discrimination is practiced as between carriers and connections in cases with respect to which the service is rendered under the same circumstances and conditions, unlawful results follow." The Commission there found, at page 73, that "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory." That finding was a necessary preliminary to the conclusion therein reached that complainant was being discriminated against by defendants in the matter of divisions of joint rates, in violation of provisions of the act [fols. 45-51] similar to those now in section 3(4). If divisions of joint rates were a "charge" under the law as it stood then, they must be a "charge" under the law as it stands today.

To my mind it is obvious that the complaining barge lines are being subjected to unlawful discrimination in and to the extent that the defendants operating from East St. Louis to Danville make a greater charge as compensation for their services when the transportation of this sulphur is by barge from Galveston to East St. Louis than they receive for such services when the transportation is by rail from New Gulf to East St. Louis.

[fol. 54] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 18, 1954

The Interstate Commerce Commission, one of the defendants in the above-entitled cause, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs 1 to 8, inclusive, of plaintiffs' complaint, the Commission admits the same.

II

Answering the allegations of paragraph 9 of the complaint, the Commission admits the filing by plaintiffs of the complaint in the Commission proceedings as alleged in paragraph 9 and that what appears to be a true copy thereof is [fol. 55] attached to their complaint in the court proceedings as Exhibit A.

III

Answering the allegations of paragraph 10 of the complaint, the Commission admits that the railroads named in said paragraph were designated as defendants in the complaint filed in the Commission proceedings. However, the Court is respectfully referred to said complaint (Exhibit A to plaintiffs' complaint herein) for full, true, and accurate information as to the allegations contained therein. The Commission admits that answers were duly filed by the railroad defendants named in said complaint.

IV

Answering the allegations of paragraph 11 of the complaint, the Commission admits that a hearing was had before one of its examiners and that said examiner issued his proposed report, which is attached to the complaint herein, containing recommended findings, to which the Court is respectfully referred for a more complete description of the findings recommended therein.

V

Answering paragraph 12 of the complaint, the Commission admits the same.

VI

Answering paragraph 13 of the complaint, the Commission admits that evidence was taken at the hearings before the Commission in regard to the issues raised by plaintiffs in their complaint, but the allegations as to what the evidence showed, the Commission avers, are argumentative, and it is not required to make answer thereunto. However, the Commission alleges that its report and order here under attack are supported by the evidence taken in the hearings referred to in said paragraph 13.

[fols. 56-57] VII

Answering the allegations of paragraph 14 of the complaint, the Commission denies that its report and order herein are either capricious, arbitrary, erroneous, without rational basis, beyond its power to make or in violation of any statute referred to in said paragraph and should be set aside for any of the reasons stated therein or for any other reason or reasons.

VIII

Answering paragraph 15 of the complaint, the Commission denies that its report and order herein subject plaintiffs to irreparable loss or damage or any other kind of loss or damage, and it is further denied that the Commission's decision will bring about any "disastrous effects" upon plaintiffs' operations.

Except as herein expressly admitted, the Commission de-

II

Deny that the matter was argued orally before Division 3 of the Commission, as alleged in Paragraph 12 of the complaint.

III

Deny each and every allegation of Paragraphs 13, 14 and 15 of the complaint.

[fol. 61] And Intervenors further state:

IV

That the final order of the Interstate Commerce Commission was within the power of the Commission to enter, that the order is well supported in fact and at law and that the order is wholly consistent with the National Transportation Policy.

Wherefore, defendants respectfully pray that the order of the Interstate Commerce Commission be sustained, and that plaintiffs take nothing by their suit.

John A. Daily, 1225 LaSalle Street Station, Chicago 5, Illinois; Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Building, Houston, Texas, Attorneys for Intervenors, The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

[fol. 62-64] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION—June 22, 1954

This cause coming on to be heard on the motion of The New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad

[fol. 71] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, Federal Barge Lines, Inc., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMERCE COMMISSION, Defendants

THE NEW YORK CENTRAL RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, Illinois Terminal Railroad Company, and Wabash Railroad Company, Intervening Defendants.

Donald Macleay (Macleay and Lynch), of Washington, D. C.; for Plaintiffs Dixie Carriers, Inc., and Coyle Lines Incorporated.

Richard J. Hardy and Nuel D. Belnap (Belnap and McAuliffe), of Chicago, Illinois; for Plaintiffs American Barge Line Company and Federal Barge Lines, Inc.

[fol. 72] E. V. Greenwood (Fulbright, Crooker, Freeman, Bates & Jaworski) of Houston, Texas; for all Plaintiffs.

Stanley N. Barnes, Asst. Atty. Gen., of Washington, D.C. and Malcolm R. Wilkey, U.S. Atty., of Houston, Texas, and Edward M. Reidy, Chief Counsel, of Washington, D.C., and Samuel R. Howell, Asst. Chief Counsel and Leo H. Pou, of Washington D.C.; for Defendants the United States of America and the Interstate Commerce Commission.

John A. Daily, of Chicago, Illinois, and Palmer Hutcheson, Jr. (Hutcheson, Taliaferro & Hutcheson) of Houston, Texas; for Intervenors, New York Central Railroad Company, Chicago and Eastern Illinois Terminal Railroad Company, and Wabash Railroad Company.

E. V. Greenwood (Fulbright, Crooker, Freeman, Bates and Jaworski) of Houston, Texas, and John H. Eisenhard, Jr., of Washington, D.C.; for Intervening Plaintiff American Waterways Operators, Inc.

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

KENNERLY, District Judge:

This is a suit by Plaintiffs, Dixie Carriers, Inc., Coyle [fol. 73] Lines Incorporated, American Barge Line Company and Federal Barge Lines, Inc., against the Interstate Commerce Commission (for brevity called Commission) and the United States of America, Defendants. The New York Central Railroad Company, the Chicago and Eastern Illinois Railroad Company, the Illinois Terminal Railroad Company and the Wabash Railroad Company have intervened on the side of Defendants and are referred to as Intervening Defendants. The American Waterways Operators, Inc., have also intervened on the side of Plaintiffs and are referred to as Intervening Plaintiffs. The trial was before a three-judge-court convened under sections 2284 and 2325 of Title 28, U.S.C.A.

Plaintiffs moving under the Interstate Commerce Act, as amended by the Transportation Act of 1940 respecting water carriers (49 U.S.C.A., Secs. 901 et seq.) complain of and seek to enjoin, set aside and annul an order of the Commission with respect to rail rates, barge rates and rail-barge rates on sulphur from sulphur mines in Texas and approximately 60 miles from Galveston, Texas, but described as being in the Galveston area, through East St. Louis, Illinois, to Danville, Illinois. Specifically, Plaintiffs sought in their application before the Commission to have established a through barge-rail route and a joint through barge-rail rate for sulphur from Galveston, Texas, to Danville, Illinois, via East St. Louis, i.e. by barge from Galveston to East St. Louis, and by rail from East St. Louis to Danville. [fol. 74] Plaintiffs claimed that the establishment of such route and rate was necessary and desirable in the public interest and that the failure and refusal to establish same discriminated against them as connecting carriers. The order complained of which denied Plaintiffs' application to the Commission was entered in a proceeding before the

Commission entitled American Barge Line Company, et al., v. Chicago & Eastern Railroad Company, et al. (I.C.C. Docket No. 30731, reported in 287 I.C.C. 403 and 291 I.C.C. 422.)

Among the several persons who were parties to, intervened in or took part in the hearings before the Commission there were no shippers nor consumers of sulphur. There was one intervenor, the American Waterways Operators, Inc., who appeared on behalf of the "inland water carriers generally throughout the United States", and the Galveston Chamber of Commerce, intervened, was represented at the hearings, but did not otherwise participate in the proceedings. But no one purported to participate in the proceedings on behalf of or in the interest of the public generally.

The facts are not greatly if at all in dispute, and are fully shown by the Record. They may be briefly summarized substantially as follows:

(a) Plaintiffs here, who were the complainants in the proceeding before the Commission, are common carriers by water, operating under certificates of public convenience and necessity issued by the Commission. The American [fol. 75] Barge Line Company and the Inland Waterways Corporation, operating Federal Barge Lines, render common carrier barge service on the Mississippi River between (among others) Port Sulphur (near New Orleans, Louisiana) and New Orleans, Louisiana on the one hand, and East St. Louis, Illinois, on the other hand, a distance of approximately 1,049 miles. The Coyle Lines, Incorporated, and Dixie Carriers, Inc., render common carrier barge service from Galveston, Texas, to New Orleans, Louisiana, a distance of approximately 357 miles. Each of the Intervening Defendants operate rail lines from East St. Louis, Illinois, to Danville, Illinois, a distance of approximately 184 miles. The Intervening Plaintiff, the American Waterways Operators, Inc., is here because of its interest in the legal questions involved.

(b) The volume of sulphur movement from the mines in Texas to Danville, Illinois, is approximately 20,000 tons a year. During the last six months of 1950, the preponderance of the sulphur traffic from Galveston to Danville moved by rail to Galveston, by barge to East St. Louis, and by rail

beyond. That movement, however, was by a contract water carrier which has since discontinued operation. Thereafter the sulphur moved from the mines, not through Galveston nor over Plaintiffs' lines, but on a joint through rate over an all-rail route, i. e. from the mines over the lines of the Texas and New Orleans Railroad Company directly to Shreveport, Louisiana, the Texas and Pacific Railway Company to Texarkana, Arkansas, the Missouri-Pacific Railroad Company (Guy A. Thompson, trustee) to East St. Louis, and the Wabash Railroad Company to Danville. The distance over that route from the sulphur mines is approximately 850 miles to East St. Louis, and is approximately 184 miles from East St. Louis to Danville, making a total distance of 1,034 miles from the sulphur mines to Danville. As stated, the sulphur mines are in the Galveston area, but the distance from them to the port of Galveston is approximately 60 miles.

(c) The all rail joint through rate on sulphur (Galveston rate) from the sulphur mines to Danville is $9.184 per ton. The Commission found these rates to be on a "depressed basis" in that the combination local rates which would apply in the absence of such joint through rate is $11.686 or $2.502 higher than such joint rates. Such combination local rates are made up of rates of $8.736 from the mines to East St. Louis, and a local rate of $2.95 from East St. Louis to Danville.

(d) There are no joint barge-rail rates in effect either from the sulphur mines or from Galveston to Danville or [fol. 76] any other point,[1] The combination barge-rail rate on sulphur from Galveston to Danville is $8.27, composed of Plaintiffs' joint barge rate of $5.32 from Galveston to East St. Louis and Intervening Defendants' rail rate of $2.95 from East St. Louis to Danville. The combination rate of $8.27 does not include unloading and loading and switching charges, etc., at East St. Louis. However, barge lines absorb, or are willing to absorb such charges at East St. Louis. Such charges are for unloading the barges 44 cents a ton, the switching charges are approximately 30

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[1] See Thompson v. United States, 343 U. S. 558, for a discussion of through routes, etc.

cents a ton, and other charges are approximately 15 cents a ton.

The price of sulphur at Galveston is $1.50 a ton higher when loaded in barges than when loaded in rail cars 60 miles away at the mines. The higher price reflects in part the rail rate of $1.20 per ton from the mines to Galveston, 11 cents for wharfage, 37 cents for unloading from cars to storage bins, 22 cents for transfer from bins to barges, 4.55 cents for stevedoring, and 1.41 cents for pier rental. Such combination rate does not include and the barge lines do not absorb this Galveston item of $1.50 per ton.

(c) Complainants proposed and were refused the establishment of a joint through route and a joint through barge-rail rate of $7.57 for sulphur, not from the sulphur mines but from Galveston to Danville, to be divided $5.41 for the barges lines from Galveston to East St. Louis, and $2.26 for the rail lines from East St. Louis to Danville. The rate was arrived at by adding $1.01 to the Port Sulphur to Danville rate of $6.66. This proposal contemplated that the barge lines would absorb the charge mentioned at East St. Louis but there was no such commitment respecting the $1.50 charge mentioned at Galveston.

1. The case involves a construction of the Interstate Commerce Act as amended by the Act of 1940 respecting water carriers (49 U.S.C.A., Secs. 901, et seq.). Plaintiffs claimed before the Commission and claim here that under such Act the combination rates and charges on sulphur over barge-rail route from Galveston, Texas, through East St. Louis, Illinois to Danville, Illinois, were unreasonable, that they [fol. 77] discriminated against Plaintiffs, and that the public interest required that a through barge-rail route and joint through barge-rail rates be established with reasonable differentials, etc.

The Commission, after a full hearing (Reports of December 22, 1952, and January 19, 1954) dismissed Plaintiffs' complaint.

Defendants' first contention here is that the findings and

conclusions of the Commission are fully supported by the evidence, that its findings are adequate and in full accord with the Act and that its Order should not be set aside here. We agree that this is true.

Congress has with wholesome care clothed the Commission with the power and made it its duty after, as here, a full hearing to determine when existing rates are discriminatory, where and under what circumstances through routes and through rates should be established, etc. The Commission is given wide discretion and when its findings and conclusions are, as here, supported by the evidence and in accordance with the Act they will not be disturbed by the courts. Alabama Great Southern R.R. Co. v. United States, 340 U. S. 216; Capital Transit Co. v. United States, 97 F. Supp. 614; Interstates Commerce Commission v. Mechling, 330 U. S. 567; McLean Trucking Co. v. United States, 321 U. S. 67; Mississippi Valley Barge Line v. United States, 292 U. S. 282; United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515; Interstate Commerce Commission v. United Pacific R.R., 222 P. S. 541; Virginia Ry. Co. v. [fol. 78] United States, 272 U. S. 568; Western Pacific Chemical Co. v. United States, 271 U. S. 268; Ayrshire Corporation v. United States, 335 U. S. 573.

2. We have, however, independently of the conclusions reached by the Commission, considered the Record and reached substantially the same conclusion.

As we have pointed out, the Commission in determining the questions was required and we are required to consider not only Plaintiffs' desire for and interest in a through barge-rail route and through joint rate, but the effect thereof if established upon all others concerned. This rule is well stated in Ayrshire Corporation v. United States, 335 U. S. 573, where in considering the rates for the transportation of coal, it is said:

> "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of

the three, great complexities are often encountered." etc.

The Commission doubtless had in mind this rule when it considered, as we have, the effect of the establishment of the proposed through route and joint rate.[2]

We also attach importance to the fact, as did the Commission, that only Plaintiffs and one Intervenor took part in the proceedings before the Commission, and only Plaintiffs and such Intervenor are here seeking the establishment [fol. 79] of such route and rates. No shipper nor consumer of sulphur nor other person is making common cause with Plaintiffs.[3]

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[2] The Commission says:

"In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy which call for fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us to force rail carriers, where they maintain a depressed rate to meet water competition to further depress their earnings on the traffic in order to favor the same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for the 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis, or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low." (Com. 1st Report, p. 407.)

[3] The Commission says:

"As stated, no shipper has evidenced an interest in the establishment of the rate sought, and the rate over the all-

[fol. 80] We also point to the route which shipments of sulphur would follow in Plaintiffs' suggested through barge-rail route and through joint rate, i.e. by barge from Galveston to East St. Louis and by rail from East St. Louis to Danville, with no provision made for the $1.50 per ton cost and expense of transportation from the sulphur mines to Galveston and of loading, unloading, etc. there. While Plaintiffs are willing to absorb charges of loading, unloading, etc., at East St. Louis, there is nothing to indicate that they are willing to absorb such Galveston charges.

Also, the Commission and we have compared the proposed joint barge-rail rate and the movement of sulphur thereunder with the other rates discussed herein, and the movement of sulphur thereunder. Although it is mandatory that the Act must be so administered as to recognize and preserve the inherent advantages of all modes of transportation, including water transportation, we discover here no violation or deviation from this rule. There is nothing in the record indicating that the refusal of the Commission to grant Plaintiffs' request or to approve the route and rate requested by Plaintiffs failed to preserve the advantages and rights of all parties. When the whole record is considered in the light of all the provisions of the Act and many cases construing same, we think Plaintiffs have not shown their claim of discrimination to be meritorious. Nor is there merit in Plaintiffs' claim that [fol. 81] the establishment of the proposed through route and joint through rate is in the public interest. Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591; Interstate Commerce Commission v. City of Jersey City, 322 U. S. 503; Interstate Commerce Commission v. Mechling, supra; Thompson v. United States, 343 U. S. 549; United States v. Great Northern Ry. Co., 343 U. S. 562.

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rail route which it is intended to meet is on a depressed basis. The defendants urge that their participation in barge-rail routes, as desired by complainants, is not shown to be necessary or desirable in the public interest." (Com. 1st Report, p. 406.)

3. Plaintiffs strongly press upon us the decision of the Supreme Court in the Mechling case (I.C.C. v. Mechling, supra). That Court there uses this language:

> "Judicial review of the findings of fact and the expert judgments of the Interstate Commerce Commission where the Commission acts within its statutory authority is extremely limited. And § 307(d) of the 1940 Act authorizes the Commission 'in the case of a through route' to 'prescribe such reasonable differentials as it may find to be justified' between all-rail rates and the joint rates in connection with such common carrier by water.' Cf. United States v. Chicago Heights Trucking Co., 310 U. S. 344, 352-353; Board of Trade of Kansas City v. United States, 314 U. S. 534, 546. But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates. The provisions of the Transportation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers [fol. 82] the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service." etc.

It then held that under the facts in that case the Order of the Commission should not be permitted to stand because

not based on adequate findings and evidence. But the facts there greatly differ from the facts here. Here, as has been pointed out, there is neither a showing that Plaintiffs' suggested route and rate is in the public interest, nor that it is fair to shippers, consumers and the public generally. Neither have Plaintiffs shown that the existing rates discriminate against them.

The case of Alabama Great Southern R.R. Co. v. United States (supra) was one where, as here, the Commission was called upon to establish through routes and joint through rates, and where the Court citing the Ayrshire case points out that the Commission has to safeguard the interest of the shipper and consumer as well as those of the carrier, etc. In speaking of the Mechling case, the Court uses this language:

> "Appellants also contend that the prescription of differentials in this proceeding deprives them of their inherent advantages contrary to the National Transportation Policy. They point to I.C.C. v. Mechling, 330 U. S. 567, as having established the principle that the lower costs of the barge carrier there involved was an inherent advantage, and that the Commission had no discretion to approve a rate structure which would reduce such advantage. They argue that the 'fair and impartial regulation' called for by the National Transportation Policy demands that the rule of the Mechling case be applied impartially to protect the 'inherent [fol. 83] advantage' of the rail carriers here.
>
> 'In the Mechling case, the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. This was a plain case of discrimination. There were different rates provided for equal service without any showing that any additional service was rendered for the additional charge. Here the question is whether the barge lines may charge less than the railroads for the different service they render. There is no unlawful discrimination here as

there was in the Mechling case. The differentials providing a lower rate for barge service do not constitute an 'unjust discrimination' by express proviso of § 305(c) of the Act. 54 Stat. 935, 49 U.S.C. § 905(c)."

We believe the Mechling case is not controlling here.

From what has been said it follows that judgment should be and is entered here for Defendants. Let appropriate decree be drawn and presented.

The clerk will file this opinion.

——, Judge.

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., et al., Plaintiffs

v.

UNITED STATES OF AMERICA, et al., Defendants

JUDGMENT—February 16, 1955

This action having come on for final hearing on November 15, 1954, before a duly constituted three-judge District Court convened pursuant to Sections 2284 and 2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 3, 1955, filed its opinion herein, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings, and conclusions, it is hereby

Ordered, adjudged, and decreed that the relief prayed

for by the plaintiffs be, and the same hereby is, denied, and their complaint be, and the same hereby is, dismissed.

This the 16 day of February, 1955.

J. C. Hutcheson, Jr., Chief Judge, United States Court of Appeals for the Fifth Circuit; Ben C. Connally, United States District Judge;
not legible, United States District Judge.

[fols. 85-86] Approval of Form of Judgment

The undersigned, as attorneys of record for the respective parties to this action, hereby indicate their approval of the form of the annexed and foregoing judgment.

Macleay and Lynch, by Francis W. McIninv, Attorney for Dixie Carriers, Inc., and Coyle Lines, Incorporated, Plaintiffs; Nuel D. Belnap, Attorney for American Barge Line Company and Federal Barge Lines, Inc., Plaintiffs; Gordon Deace, Asst. United States Attorney, Attorney for the United States of America, Defendant; Leo A. Pons, Attorney for the Interstate Commerce Commission, Defendant; John A. Daily, Palmer Hutcheson, Jr., Attorneys for Intervening Railroads, Defendants.

[fol. 87] In the United States District Court for the Southern District of Texas, Houston Division

[Title omitted]

Motion for New Trial and to Amend Findings of Fact and Conclusions of Law—Filed February 16, 1955

The plaintiffs move the Court: (1) To set aside the findings of fact and conclusions of law and judgment entered herein, and to grant plaintiffs a new trial, (2) to amend its findings of fact and conclusions of law, heretofore filed, as more fully set out hereinafter.

[fol. 88] This motion is made on the grounds that the opinion filed by the Court in this case is not responsive to the issues presented to the Court for consideration, and that the Court erred in failing to pass upon the issue raised by

the pleadings, and in passing, instead, upon issues which were not presented to the Court for review.

The simple issue presented to the Court in this proceeding is whether or not the Commission correctly construed section 3(4) of the Interstate Commerce Act. As applied to the facts of the case, the issue is whether that section of the Interstate Commerce Act makes it unlawful for the intervening defendants to discriminate against the plaintiffs by charging *more* to transport sulphur from East St. Louis to Danville if it is delivered to them by a connecting water line than they charge for the identical service if it is delivered to them by a connecting rail line. The intervening defendants accomplished the discrimination by joining in the publication of through rates with their rail connections, and accepting as their share of the rate a secret contractual "division", which they have acknowledged is less than the "local" rate for the same services, while refusing to similarly join with plaintiffs; their connecting water lines; in the same type of arrangement. The facts are undisputed.

Plaintiffs sought the review of the Commission's decision *only* because it held *as a matter of law* that divisions of through rates are *not* charges within the meaning of the section cited, stating on that point:

> "Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the Act."

The Commission also considered questions under other sections of the Act as to the reasonableness of the rates, and the public interest therein, but the plaintiffs have asked review only of the Commission's ruling on the question of discrimination, as was specifically stated on page 5 of their [fol. 89] brief, i.e., ". . . the plaintiffs allege error within the scope of judicial review only as to disposition by the Commission of the issue of section 3(4) . . . ." If the plaintiffs are correct in their contention on the question of discrimination under that section, the rate in question is unlawful without regard to public interest or reasonableness, the decision of the Commission must be set aside, and the case remanded.

The opinion of the Court, as well as its findings and conclusions, relate almost entirely to questions of reasonable-

ness and public interest, which are not here in issue. Plaintiffs submit that the question of discrimination under section 3(4) of the Act did not receive adequate, if indeed it received any, consideration.

Findings of Fact and Conclusions of Law

(1) Plaintiffs appreciate the purpose of the Court to state accurately the contentions of the plaintiffs and the basis therefor, and that any inaccuracies as to such matters in the opinion are necessarily due to the failure of the plaintiffs to make such matters clear. Plaintiff's contentions, and the basis for the Commission's report and order which the Court is asked to review, are correctly stated as follows:

(a) Plaintiff claimed before the Commission that the combination rates and charges over barge-rail routes from Galveston, Texas, via East St. Louis to Danville, Illinois, are unreasonable, and that the public interest required that through barge-rail routes and joint through barge-rail rates be established with reasonable differentials, etc. The Commission held that the plaintiffs had not sustained such claims. However, the plaintiffs ask no review of that portion of the Commission's report and order in the instant case.

(b) Plaintiffs further claimed before the Commission, and *claim here*, that the action of the intervening [fol. 90] defendants in accepting less for the service performed by them in the transportation of sulphur to Danville when received from rail connections than when received from plaintiffs, constitutes discrimination in charges between connecting lines in violation of section 3(4) of the Interstate Commerce Act. Plaintiffs also claimed before the Commission, *and claim here*, that section 3(4) is violated when the intervening defendants, without just cause, refuse to make a joint rate with the plaintiffs upon as favorable a basis as with their rail connections. The Commission also ruled against the plaintiffs as to these matters.

(2) The Court is requested to enter the following additional findings of fact:

(a) On sulphur from Galveston delivered to intervening defendants at East St. Louis by plaintiffs for trans-

portation to Danville, the intervening defendants demand and collect their full local rate of $2.95 per gross ton. While the evidence before the Commission does not show the precise amount which the intervening defendants collect, under their contracts with their rail connecting lines, as their compensation for the same service on sulphur moving on the $9.184 per gross ton all-rail joint rate from Galveston and points in the Galveston area to Danville, it does establish that such amount is *less* than $2.95.

(b) There was no evidence before the Commission to show, nor did the intervening defendants contend, that the services required or the costs incurred by them in transporting to Danville sulphur received from rail connecting lines at East St. Louis were less or different from the services required or the costs incurred by them in transporting to Danville sulphur received from barge connecting lines at East St. Louis.

[fol. 91] (3) Plaintiffs further suggest that there be eliminated from the findings all references to the $1.50 per gross ton difference in selling price of surphur, dependent on whether sulphur is loaded into barges at Galveston or loaded into rail cars at mines in the same origin rate group as Galveston, and the findings relating to the local rail movement from the mines to Galveston, as being not pertinent to the issue of the case.

(4) Upon a consideration of the narrow question of law as to which the plaintiffs contend the Commission erred, the Court is requested to enter the following conclusions:

(a) The issues which the Commission was called upon to decide under section 3(4) were, first, whether there is a different "rate" or "charge" between connecting lines within the meaning of the section and, secondly, if such a difference exists, whether the circumstances surrounding plaintiffs and their traffic are so dissimilar from those surrounding the connecting lines and their traffic as to justify the difference in charges. The decision of the Commission as to the section 3(4) phase of plaintiffs' complaint rests squarely on a holding against the plaintiffs as to the first issue. The determination of that issue by the Commission and here under review by the Court is

not affected by nor related to matters of reasonableness of rates or of public interest in through routes and joint rates.

(b) The Interstate Commerce Commission erred when it held that a division of a joint rate which is assessed on traffic received from one connecting line, and a highly local rate which is assessed on traffic received from another connecting line, are not both "charges" as between connecting lines, within the meaning of section 3(4) of the Act.

(c) The Interstate Commerce Commission erred as a matter of law when it failed to hold that section 3(4) [fols. 92-106a] prohibits a carrier from refusing, without just cause, to join with one connecting line in as favorable a joint rate arrangement as that in which it joins with other connecting lines.

Respectfully submitted, Donald Macleay, Commonwealth Building, Washington 6, D. C., Attorney for Plaintiffs Dixie Carriers, Inc., Coyle Lines Incorporated; Richard J. Hardy, Nuel D. Belnap, One North La Salle Street, Chicago 2, Illinois, Attorneys for Plaintiffs American Barge Line Company, Federal Barge Lines, Inc.; (S.) E. V. Greenwood, Second National Bank Building, Houston 2, Texas, Attorney for all Plaintiffs.

Of Counsel: Macleay and Lynch, Commonwealth Building, Washington 6, D. C.; Belnap & McAuliffe, One North La Salle Street, Chicago 2, Illinois; Fulbright, Crooker, Freeman, Bates and Jaworski, Second National Bank Building, Houston 2, Texas.

[fol. 107] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL, ETC.—March 28, 1955

Upon consideration of the plaintiff's motion for a new trial and to amend the findings of fact and conclusions of

through barge and rail routes and joint rates thereover and to maintain in connection therewith reasonable differential under the corresponding all-rail rates; and that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said [fol. 23] defendants participate in the maintenance of through all-rail routes and joint rates thereover, and that the failure and refusal of the defendants to establish and maintain reasonable through routes and joint rates with complainants is in violation of Section 1 and 307(d) of the Interstate Commerce Act, and defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of Section 3(4) thereof.

Complainants may proceed.

Mr. Belnap: Call Mr. Hartmann.

J. G. HARTMANN was sworn and testified as follows:

Direct examination.

By Mr. Belnap:

Q. State your name.

A. My name is J. G. Hartmann. My address is 611 Gravier Street, New Orleans 12, Louisiana. I am assistant traffic manager of the Inland Waterways Corporation operating the Federal Barge Lines.

Q. Have you prepared a statement, Mr. Hartmann, and Company exhibits bearing upon the issues in this case?

A. I have.

Q. Please proceed with your statement.

A. I was connected with the Traffic Department of the Illinois Central Railroad and its subsidiaries from September, 1917, to July, 1926, at which time I joined the Traffic [fol. 24] Department of the Inland Waterways Corporation. I have served in the Traffic Department of this Corporation since that time in various capacities such as Chief of Tariff Bureau, Chief Rate Clerk, Assistant General Freight Agent, General Freight Agent and Assistant Traffic Man-

law heretofore made and entered herein, and upon consideration of the answers of the Interstate Commerce Commission, defendant, and the intervening defendants, to the said motion; and the Court being fully advised in the premises, and being of the opinion that the said motion should be denied; it is, therefore,

Ordered, adjudged, and decreed, that the plaintiff's motion for a new trial and to amend the findings of fact and conclusions of law, be, and the same hereby is, denied.

This the 28 day of March, 1955.

J. C. Hutcheson, Chief Judge, United States Court of Appeals for the Fifth Circuit; Ben C. Connally, United States District Judge; T. M. Kennerly, United States District Judge.

Filed 28 day of March, 1955, V. Bailey Thomas, Clerk, by Ruby Miller, Deputy.

[fols. 108-110] Approval of Form of Order

The undersigned, as attorneys of record for the respective parties to this action, hereby indicate their approval of the form of the annexed and foregoing order.

Nuel D. Belnap, Attorney for American Barge Line Company and Federal Barge Lines, Inc., Plaintiffs; Donald Macleay, Attorney for Dixie Carriers, Inc., and Coyle Lines Incorporated, Plaintiffs; ———, Ass't United States Attorney, Attorney for the United States of America, Defendant; Samuel R. Howell, Attorney for the Interstate Commerce Commission, Defendant; Leo H. Pou, Attorney for the Interstate Commerce Commission, Defendant; Palmer Hutcheson, Jr., John A. Daily, Attorneys for Intervening Railroads, Defendants.

[fol. 111] Clerk's certificate to foregoing transcript omitted in printing.

ager. I have held my present position since May 1, ..47. I have appeared before the Commission in numerous rate cases and I am familiar with the issues involved in the present proceedings.

The Inland Waterways Corporation, hereafter referred to as Federal, is a certificated common carrier and operates a barge service on the Mississippi River from Port Sulphur, Louisiana, to Minneapolis, Minnesota, on the Missouri River, from its confluence with the Mississippi River to Omaha, Nebraska, and on the Illinois Waterways from Grafton, Illinois, to Chicago, Illinois. It also operates service between New Orleans, Louisiana, and Port Birmingham, Alabama, through the Intracoastal Canal, Mississippi Sound, Mobile, Tombigbee, Warrior and Black Warrior Rivers.

Bulk sulphur has been handled in joint barge-rail service via East St. Louis, Illinois, since 1930, at which time the first joint barge-rail rate on sulphur subject to bargeload minima weights to East St. Louis and carload minimums beyond was established. The initial rate was established from New Orleans, Louisiana, to Chicago, Illinois, and became effective April 10, 1930, in Item 2802 of Supplement [fol. 25] 17 to F.B.L. Tariff 6-G, Agent L. D. Chaffee's I.C.C. No. A-176. Sulphur moving on this rate was produced in Texas and handled from Galveston, Texas, to New Orleans by coastwise steamer. The steamer service was somewhat irregular and the traffic was handled on a combination of separately established rates to and from New Orleans. Other destinations have been added from time to time until at the present time there are joint barge-rail rates in effect from New Orleans to the destinations as shown in the top block of my Exhibit—

I would like to number that 2.

Exam. Wilkins: That will be 1.

A. (Continued) We will make it Exhibit 1, and one page statement headed "Present rates on Sulphur (Brimstone)," and there are two blocks of rates shown.

(Complainant's Exhibit No. 1, Witness Hartmann, was marked for identification.)

Exam. Wilkins: It is so marked for identification.

[fol. 1] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, COYLE LINES, INC., DIXIE CARRIERS, INC., Inland Waterways Corporations (Operating Federal Barge Lines), Complainants,

vs.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, ILLINOIS TERMINAL RAILROAD COMPANY, The New York Central Railroad Company, Wabash Railroad Company, Defendants

COMPLAINT—Filed December 13, 1950

The complaint of the above-named complainants respectfully shows:

I

That complainants are corporations engaged in transportation as common carriers by water of general commodities (including sulphur) under certificates of convenience and necessity issued by the Interstate Commerce Commission; that over routes authorized by their respective certificates and to the extent their respective routes traverse the waterways named below, complainants are so engaged on the Mississippi River between East St. Louis, Illinois, and Port Sulphur, Louisiana, and on the Gulf Intracoastal Canal between New Orleans, Louisiana, and Galveston, Texas; that the transportation of sulphur by complainants from Galveston via New Orleans to East St. Louis is under circumstances and conditions which subject such transportation to Part III of the Interstate Commerce Act; and that said complainants are connecting carriers of the above-named defendants insofar as said defendants and railways [fol. 2] connecting therewith operate to, from and via ports on the waterways just named.

II

That the defendants above-named are common carriers by railroad engaged in interstate commerce between various

A. (Continued) Subsequently, barge-rail rates were published from Port Sulphur, Louisiana, a barge origin point nearby Louisiana production points located on the Mississippi River approximately 60 miles below New Orleans, to Joliet, Illinois, and other destinations shown in the second block of my Exhibit 1. Prior to September 22, 1949, the joint barge-rail rate on sulphur from Port Sulphur, Louisiana, to Joliet, Illinois, applied to Danville, Illinois, under the application of the intermediate rule via certain [fol. 26] routes of the Chicago and Eastern Illinois Railroad and New York Central. Other rail carriers operating beyond East St. Louis, Illinois, had no routes to Joliet, Illinois, through Danville, Illinois, and consequently could not participate in the movement of sulphur to Danville. A rail proposal was subsequently approved by the Illinois Freight Association under which Federal was requested to amend its tariff by publishing the Joliet rate specifically at Danville for application via Federal Barge Lines to East St. Louis thence Chicago and Eastern Illinois direct, New York Central direct, Illinois Terminal direct and Wabash Railroad. This publication was made effective September 22, 1949, in Supplement No. 3 to Federal's Tariff 27-I, ICC 277. The current rates are published in Federal's Tariff 27-J, ICC 283.

By Mr. Belnap:

Q. What was the date of the first joint rate to Joliet, Mr. Hartmann?

A. September 14, 1948.

Q. Can you give the tariff reference?

A. Item 215, Supplement 2 to Federal's Tariff 27-G, ICC 271.

Q. Was that published as a base rate and subject to the ex-parte tariffs then in effect?

A. That's correct.

Q. What was the base rate as published?

A. $4.64 per gross ton.

Q. What was the actual rate on the date effective?

[fol. 27] A. $6.11.

Q. When the rate was published specifically to Danville, what was the measure of the rate?

states in the United States and as such defendants are subject to the provisions of the Interstate Commerce Act.

III

That the defendants, to the extent they participate in the transportation, maintain on sulphur in carloads from Galveston, and other origins in Texas to Danville, Illinois, joint rates over through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge-and-rail routes from Galveston to Danville; that as a result the existing rates and charges over barge-and-rail routes from Galveston to Danville are excessive and unreasonable; that it is necessary or desirable in the public interest for the defendants and the complainants to establish such through barge-and-rail routes and joint rates thereover and to maintain in connection therewith reasonable differentials under the corresponding all-rail rates; and that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said defendants participate in the maintenance of through all-rail routes and joint rates thereover.

IV

That the defendants have now published a reduction in their all-rail rates from both Galveston and other Texas points and from Port Sulphur, Louisiana, to Danville, as carried in Supplement No. 57 to S. W. L. Tariff No. 102-W, Agent D. Q. Marsh's I. C. C. 3862, effective December 24, 1950, concurrently with an application for relief from the Fourth Section, S. W. F. B. B-4238; that publication of such reduction while refusing to join complainants in reasonable joint differential rates at reasonable divisions over existing through barge and rail routes from Galveston to Danville augments and aggravates the discrimination against com-[fol. 3] plainants as connecting common carriers of property.

V

That by reason of the facts stated in the foregoing paragraphs the defendants have failed and refused to establish

and maintain reasonable through routes and joint rates with complainants in violation of sections 1 and 307(d) of the Interstate Commerce Act; and defendants are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) thereof.

Wherefore, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation of sulphur between the origins and destinations named in paragraphs III and IV hereof such through routes and joint rates, as the Commission may deem reasonable and just and otherwise lawful, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, December 12th, 1950.

American Barge Line Company, Inc., by Wesley A. Rogers, Registered Practitioner, Grant Building, Pittsburgh 19, Pa. Coyle Lines, Inc., by M. M. Cummings, Vice President, P. O. Box 6056, Station A, New Orleans 14, La. Dixie Carriers, Inc., by John S. Hinkle, Vice President, Cotton Exchange Bldg., Houston 2, Texas. Inland Waterways Corporation (Operating Federal Barge Lines), International Bldg., New Orleans 12, La., by (S.) John S. Belnap, John S. Burchmore, Robert N. Burchmore, Nuel D. Belnap, 2106 Field Bldg., Chicago 3, Ill., Its Attorneys.

[fol. 4] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

PETITION OF GALVESTON CHAMBER OF COMMERCE FOR LEAVE TO INTERVENE—Filed January 19, 1951

Comes now your Petitioner, the Galveston Chamber of Commerce, and respectfully represents that it has an interest in the above-entitled proceeding, and desires to in-

A. The $6.66.

Q. That represents an increase over the $6.41 for what reason?

A. Because the ex-parte 168 increases had become effective.

Q. Proceed.

A. No joint barge-rail rates have ever been published on sulphur from Galveston, Texas.

Mr. Day: Pardon me. Does that mean to any point?

The Witness: That is to any point.

A. (Continued) In recent years common carrier barge services have been established and developed between Galveston and New Orleans on the Gulf Intracoastal Canal. The common carrier services on that waterway involved in the instant case are Coyle Lines, Inc., and Dixie Carriers, Inc.

By Mr. Belnap:

Q. Those lines are also complainants.

A. That's Correct.

Federal has maintained for several years joint all-water rates with the barge lines just named from Galveston, Texas, to Upper River Ports served by Federal such as East St. Louis, and Chicago, Illinois. In its all-water rate structure Federal has maintained New Orleans and Port Sulphur, which it serves directly, on the same basis. Joint all-water rates with connecting barge-lines from Galveston [fol. 28] have been and are based $1.01 per gross ton over Federal's local rates from Port Sulphur and New Orleans.

At the request of shipper, Federal filed a formal proposal with the Illinois Freight Association on December 27, 1949, proposing a joint barge-rail rate from Galveston, Texas, to Danville, Illinois, of $7.67 per gross ton, subject to barge minimum weight to East St. Louis, Illinois, and carload minimum weight beyond. This rate was made $1.01 per gross ton higher than the applicable barge-rail rate from Port Sulphur, Louisiana, to Danville, Illinois. The $1.01 per gross ton spread used in this proposal is the same as that existing in all-water rates from Port Sulphur and Galveston to river ports served by the Federal Barge Lines as well as rates to ports on the Great Lakes to

which sulphur is handled via Federal Barge Lines to Chicago thence Great Lakes Carriers. This proposal was handled by the Illinois Freight Association under Docket IRC 960-15.

Under date of January 16, 1950, the Chairman of the Illinois Freight Association advised Federal that this proposal had been considered by the Illinois Rate Committee at its January, 1950, meeting at which time it was not recommended.

At the specific request of the shipper, Federal requested the Chairman of the Illinois Freight Association to redocket this proposal with his association and both the shipper and the consignee located at Danville wrote the Chairman of the Illinois Freight Association complaining of the [fol. 29] discrimination against Galveston, Texas, and requested that the proposal be approved.

Under date of March 24, 1950, the Chairman of the Illinois Freight Association advised that the subject was considered by the Illinois Rate Committee at its March, 1950, meeting at which time the following was recommended:

"The proposal as docketed, amended to add Depue, Illinois, at the same rate as LaSalle, Illinois, and with the same route."

Under date of May 22, 1950, the Chairman of the Illinois Freight Association advised that this proposal was given further consideration at a recent meeting of the Illinois Executive Committee and it was not recommended.

Exhibit 2——

Exam. Wilkins: That will be so marked for identification.

(Complainant's Exhibit No. 2, Witness Hartmann, was marked for identification.)

A. (Continued) Exhibit 2 is a mimeographed map showing the *the* all-rail route from New Gulf, Texas, a representative Texas sulphur mine nearby Galveston, Texas, to Danville, Illinois, via the short route composed of Southern Pacific to Shreveport, Louisiana, Texas & Pacific to Texarkana, Texas, Missouri Pacific to St. Louis, Chicago and Eastern Illinois to Glover, Illinois, and Illinois Terminal

tervene in and become party to said proceeding, and for grounds of the proposed intervention says:

I.

That the Galveston Chamber of Commerce is a voluntary organization incorporated under the laws of the State of Texas, with its principal office and place of business located in the City of Galveston, Texas, and whose membership consists of persons, firms, corporations and others engaged in the business of handling various commodities in domestic and foreign waterborne commerce, and one of its constituent members, the Board of Trustees of Galveston Wharves, operates the waterfront properties acquired by the City of Galveston, as authorized by the Commission in *City of Galveston, Acquisition, Operation, and Bonds*, 242 I. C. C. 605, [fol. 5] which includes docks, wharves, transit sheds, and other equipment, and the maintenance and construction of specially designed docks and piers used in the handling of crude sulphur in domestic and foreign waterborne commerce, involving expenditure of millions of dollars.

II

That Petitioner has for its object and purpose the protection and welfare of its members; also, the general welfare of said City and Port where large private, municipal and federal investments have been made in channel works, docks, wharves, and other port terminal facilities for use in the handling of domestic and foreign waterborne commerce.

That crude sulphur moves extensively through Galveston's port facilities via barge through the intracoastal canal to various destinations reached through our inland waterway system, including Danville, Illinois, Great Lakes ports, etc.

That the establishment of reduced all-rail rates from Texas origins to Danville, Illinois, without the establishment of joint barge-rail rates via barge-and-rail routes from Galveston to Danville, Illinois, will directly and effectively result in a diversion of sulphur to all-rail routes, thereby adversely affecting our interests. Therefore, your

Petitioner desires to intervene in support of complainant.

The granting of this petition will not broaden the issue.

III

Wherefore, said Petitioner prays leave to intervene and be treated as party hereto with the right to have notice of hearing and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by coun-
[fol. 6] sel upon brief, and at the oral argument, if oral argument is granted.

Respectfully submitted, Galveston Chamber of Commerce, by (S.) F. G. Robinson, Traffic Manager and Registered Practitioner.

Dated at Galveston, Texas, January 16th, 1951.

Duly sworn to by F. G. Robinson. Jurat omitted in printing.

[fol. 7] INTERSTATE COMMERCE COMMISSION

[Title omitted]

ORDER PERMITTING INTERVENTION OF GALVESTON CHAMBER OF COMMERCE—January 24, 1951

In the Matter of Petition for Leave to Intervene.

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon;

Upon consideration of the record in the above-entitled proceeding and petition filed on behalf of the Galveston Chamber of Commerce;

It is ordered, That the said the Galveston Chamber of Commerce, be, and it is hereby, permitted to intervene and be treated as a party to this proceeding, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard on brief and on oral argument, if oral argument is heard; provided,

to Danville is 1,048 miles. The all-rail distance via the indirect route consisting of southern Pacific to New Orleans, Louisiana, Illinois Central to East St. Louis, Illinois, thence Wabash to Danville, Illinois, is 1,339 miles.

[fol. 30] The all water distance from Galveston, Texas, to East St. Louis, Illinois, via the Gulf Intracoastal Canal to New Orleans, Louisiana, thence, the Mississippi River as shown by red line on the map is 1,406 miles, made up 357 miles from Galveston to New Orleans and 1,049 miles from New Orleans to East St. Louis. The same rail routes are available beyond East St. Louis on traffic brought into East St. Louis by barge as on traffic brought in by rail carriers.

Exhibit 1 shows the extent to which joint through barge-rail rates are published on crude sulphur in bargeload quantities from New Orleans, Baton Rouge and Port Sulphur, Louisiana, and a comparison of these rates with the all-rail rates. The barge-rail rates from New Orleans and Baton Rouge, Louisiana, are proportional rates and apply only on coastwise traffic and include the cost of transferring to barges of the Inland Waterways Corporation at New Orleans or Baton Rouge, Louisiana. The rates from Port Sulphur, Louisiana, apply on sulphur originating at that point.

Prior to Ex-Parte 168 increases the $6.72 rate shown from New Orleans and Baton Rouge and the $6.66 rate shown from Port Sulphur, Louisiana, were both $6.11. Under the Ex-Parte 168 increases, the rate from New Orleans and Baton Rouge was subjected to Table 5 of the Increase Tariff or an increase of 10 per cent while the rate from Port Sulphur, Louisiana, was subject to Table 3 of the Increase Tariff or an increase of 9 per cent. This [fol. 31] accounts for the fact that the proportional rate from New Orleans and Baton Rouge is presently $6.72 whereas the local rate from Port Sulphur, Louisiana, is $6.66.

The price of sulphur loaded in barges at Port Sulphur, Louisiana, or Galveston, Texas, is $1.50 per gross ton higher than on sulphur loaded into rail cars at Port Sulphur, Louisiana, or at Texas mines. In making a comparison of the barge-rail rates with the all-rail rates, this $1.50 per gross ton difference in price must be taken into consider-

ation. On this basis, the charges via the barge-rail route from Port Sulphur, Louisiana, to Danville would be $8.16 per gross ton made up of the price differential of $1.50 per gross ton, plus the barge-rail rate of $6.66.

If a barge-rail rate is established from Galveston, Texas, to Danville, Illinois, on the usual basis of $1.01 per gross ton over the rate from Port Sulphur, Louisiana, such barge-rail rate will be $7.67 per gross ton. Adding the $1.50 price differential would make the charges via the barge-rail route from Galveston to Danville $9.17 per gross ton. This rate is to be compared with the presently effective all-rail rate of $9.184 from Galveston, Texas, to Danville, Illinois.

By Mr. Belnap:

Q. That is a difference, Mr. Hartmann, between those two rates of only 1.4 cents per gross ton?

A. That's correct.

Q. If the only thing to be considered was the rate you had [fol. 32] just given, would you be able to get any traffic on that basis?

A. No, I am quite sure we wouldn't.

Q. What has been your experience as to whether there is a need for a substantial differential or difference by some method or other, if you are to get traffic?

A. Well, there always has been the necessity of a differential under the rail rate in order for the barge carriers to participate in the traffic. We have had experience in a number of instances where differentials were either eliminated or reduced to a point where the barge line lost the traffic because there apparently wasn't enough savings to the shipper or man paying the freight charges to permit movement by water.

Q. Has it been your experience you have to have substantial difference to get the traffic?

A. That's right.

Q. What explains your desire to put in this rate which is a difference of only 1.4 cents per gross ton?

A. That shipper said we would probably be able to get some sulphur from Galveston on that rate because of some

however, that the permission to intervene herein granted shall not be construed to allow interyener to introduce evidence which will unduly broaden the issues raised in the complaint;

It is further ordered, That a copy of the intervening petition be served upon complainants and defendants; and that a copy of this order be served upon each of the parties to this proceeding;

Dated at Washington, D. C., this 24th day of January A.D., 1951.

By the Commission, Commissioner Mahaffie. W. P. Bartel, Secretary. (Seal.)

[fol. 8] BEFORE THE INTERSTATE COMMERCE COMMISSION

PETITION FOR LEAVE TO INTERVENE IN BEHALF OF THE AMERICAN WATERWAYS OPERATORS, INC.

[fol. 9] Comes now your petitioner, The American Waterways Operators, Inc., and respectfully represents that it has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That The American Waterways Operators, Inc., is a Corporation, incorporated in Delaware, with the principal office at 1319 F Street, N. W., Washington, D. C., and is an Association of common, contract, and private water carriers who operate throughout the Ohio and Mississippi River Systems, the Gulf Intracoastal Waterway, the Gulf of Mexico, the Atlantic Intracoastal Waterways and waterways in California and Washington. The organization is a non-profit Corporation which has for its general purpose the consideration and solution of problems of management and policy affecting the operation and welfare of water carriers.

II. That under the policy of The American Waterways Operators, Inc., as duly established by the Board of Directors under the Constitution and By-Laws, the

[fol.10] Association is required to intervene in cases such as the instant proceeding where the issues and the results thereof affect the general welfare of the industry.

III. That the Commission by Division 3 has issued its Report and Order in the entitled proceeding on December 22, 1952, Commissioner Knudsen dissenting. That there has been filed under date of March 6, 1953, a Petition for reopening, reconsideration and Oral Argument by the complainants. Therefore, because of the serious effect of the majority opinion in this case, the common water carrier industry as a whole and this Association, representing inland water carriers generally throughout the United States, have a direct interest in the proceedings and on this basis this Petition for leave to intervene is filed.

IV. That this petition of intervention does not unduly broaden the issues in this proceeding.

Wherefore, The American Waterways Operators, Inc., prays leave to intervene in and be treated as a party hereto [fol. 11] with the right to participate in any future proceeding conducted in connection herewith, including oral argument.

(S.) John H. Eisenhart, Jr., Attorney.

Dated at Washington, D. C., March 12, 1953.

[fol. 12] [Title omitted]

ORDER PERMITTING INTERVENTION OF AMERICAN WATERWAYS OPERATORS, INC.—May 11, 1953

Upon consideration of the record in the above-entitled proceeding and petition filed on behalf of The American Waterways Operators, Inc.;

It is ordered, That the said The American Waterways Operators, Inc., be, and it is hereby, permitted to intervene and be treated as a party hereto for the purpose of participating in any further proceedings herein.

It is further ordered, That a copy of this order be served upon each of the parties to this proceeding.

By the Commission, Division 3. George W. Laird, Acting Secretary. (Seal.)

[fol. 13] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

ANSWER OF DEFENDANT CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.—Filed January 8, 1951

Now comes the defendant above named, and, for its answer to the complaint filed herein, respectfully states:

1. This defendant has no information respecting the truth or falsity of the allegations contained in Paragraph(s) 1.

2. This defendant admits that it is a common carrier, and, as such, is subject to the provisions of the Act to Regulate Commerce.

4. This defendant has not checked the allegations contained in Paragraph(s) 4, and can, therefore, neither admit nor deny the correctness of the same, but leaves complainant to the strict proof thereof at the trial of this cause.

3 and 5. This defendant denies the allegations contained in Paragraph(s) 3 and 5 of the complaint.

[fol. 14] Wherefore, having fully answered, this defendant prays the dismissal of the complaint filed herein.

This defendant hereby certifies that it has this day served the foregoing answer upon each party signing the complaint, by mailing to him a copy thereof, properly addressed.

Chicago & Eastern Illinois Railroad Company, by Thomas N. Cook, General Attorney.

Dated at Chicago, Illinois, January 4, 1951.

[fol. 15] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

SEPARATE ANSWER OF DEFENDANT, WABASH RAILROAD COMPANY—Filed January 15, 1951

Comes now the Wabash Railroad Company, and as its answer to complaint filed in the above-entitled cause, respectfully states to the Commission as follows:

1. It admits the allegations contained in paragraphs numbered I and II.

2. It denies the allegations contained in paragraphs numbered III, IV and V.

3. The Wabash Railroad Company does not have sufficient information to either affirm or deny paragraph of the complaint numbered.

Wherefore, having fully answered, Wabash Railroad Company asks that this complaint be dismissed as to it.

Respectfully submitted, (S.) by R. B. Elster, Its Attorney.

January 11, 1951, St. Louis, Missouri, R. B. Elster, Attorney, 1667 Railway Exchange Bldg., St. Louis 1, Missouri.

[fol. 16] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, et al.

v.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, et al.

Stenographer's Minutes of March 13, 1951

Room A-1, Hotel New Orleans,
New Orleans, Louisiana.

Met, pursuant to notice, at 9:30 a. m.

Before Andrew C. Wilkins, Examiner

APPEARANCES

Nuel D. Belnap, 2106 Field Building, Chicago 3, Illinois, appearing for Inland Waterways Corporation (operating Federal Barge Lines), complainant.

Joseph G. Hartmann, 611 Gravier Street, New Orleans 12, Louisiana, appearing for Inland Waterways Corporation (operating Federal Barge Lines), complainant.

Wesley A. Rogers, 1520 Grant Building, Pittsburg 19, Pennsylvania, appearing for American Barge Line Company, complainant.

Donald Macleay, 1625 K Street, N. W., Washington 6, D. C., appearing for Coyle Lines, Inc., and Dixie Carriers, Inc., complainants.

F. G. Robinson and E. H. Thornton, Galveston, Texas, appearing for Galveston Chamber of Commerce, inter-
[fol. 17] venor in support of complaint.

Leo P. Day, 1225 LaSalle Station, Chicago 5, Illinois, appearing for defendant.

George T. Barry, 1463 Railway Exchange Building, St. Louis, Missouri, appearing for Wabash Railroad Company, of defendants.

J. F. McWilliams, Room 701, 332 South Michigan Avenue, Chicago 4, Illinois, appearing for Chicago and Eastern Illinois Railroad Company, of defendants.

[fol. 18] COLLOQUY BETWEEN EXAMINER AND COUNSEL

Exam. Wilkins: The Interstate Commerce Commission has assigned for hearing before me at this time and place Docket No. 30731, American Barge Line Company, et al. vs. Chicago and Eastern Illinois Railroad Company, et al.

Who appears for complainants?

Mr. Belnap: Nuel D. Belnap and Joseph Hartmann, appearing for Inland Waterways Corporation, operating Federal Barge Lines, complainant.

Mr. Rogers: Wesley A. Rogers, 1520 Grant Building, Pittsburg, Pennsylvania, appearing for American Barge Line Company, complainant.

Exam. Wilkins: State whether you are a practitioner.

Mr. Rogers: I am a registered practitioner.

Mr. Macleay: Donald Macleay, 1625 K Street, N. W. Washington 6, D. C., appearing for Coyle Lines and Dixie Carriers. I am a registered practitioner.

Exam. Wilkins: Any other appearances for complainants?

Mr. Robinson: Intervenor in support of.

Exam. Wilkins: Has your petition been granted?

Mr. Robinson: Yes, sir.

Exam. Wilkins: When was it granted?

Mr. Robinson: It was granted by order of the Commission dated January 24, 1951.

Exam. Wilkins: Who was that?

[fol. 19] Mr. Robinson: The Galveston Chamber of Commerce.

Exam. Wilkins: That's correct.

Any other appearances for complainants or intervenors in support of complainants?

Mr. Robinson: F. G. Robinson and E. H. Thornton, Galveston, Texas, appearing for Galveston Chamber of Commerce, intervenors in support of complainant.

Exam. Wilkins: You are both practitioners?

Mr. Robinson: We are both practitioners, yes.

Exam. Wilkins: Any other appearances for complainants or intervenors in support of complainant?

(No response.)

Exam. Wilkins: Who appear for defendant?

Mr. Day: Leo P. Day, 1225 LaSalle Station, Chicago 5, Illinois. I have been admitted to practice.

Exam. Wilkins: Any other appearances for defendants?

Mr. Barry: George T. Barry, 1463 Railway Exchange Building, St. Louis, Missouri, appearing for Wabash Railroad Company. I have been admitted to practice.

Exam. Wilkins: Any other appearances?

Mr. McWilliams: J. F. McWilliams, Room 701, 332 South Michigan Avenue, Chicago 4, Illinois, appearing on behalf of Chicago and Eastern Illinois Railroad Company. I am a registered practitioner.

Exam. Wilkins: Any other appearances?

[fol. 20] (No response.)

Exam. Wilkins: We have another proceeding being heard here which has not been concluded.

Is there any objection on the part of the parties in this Docket No. 30731 if we call a recess until we can complete the proceeding in I&S Docket 5873?

Mr. Belnap: Can I make one inquiry off the record, sir?

Exam. Wilkins: Very well.

(Discussion off the record.)

Exam. Wilkins: On the record.

Mr. Belnap: No objection.

Mr. Day: The defendants have no objection.

Exam. Wilkins: Very well. The hearing in No. 30731 will be recessed and you will be notified when it will be resumed.

(Whereupon, at 9:45 a. m., a recess was taken pending notification the hearing would be resumed.)

[fol. 21] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, et al.

v.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY, et al.

Stenographer's Minutes of March 14, 1951

Room A-1, Hotel New Orleans,
New Orleans, Louisiana.

Met, pursuant to adjournment, at 2:00 p. m.

Before Andrew C. Wilkins, Examiner

APPEARANCES

(As heretofore noted.)

[fol. 22] PROCEEDINGS

Exam. Wilkins: The hearing will come to order.

The hearing in Docket No. 30731, American Barge Line Company, et al. vs. Chicago and Eastern Illinois Railroad Company, et al., was called as assigned on March 13, at 9:30 a. m., and a recess was taken pending the continuance of the hearing in another proceeding.

We will now resume the hearing in No. 30731, the appearances having previously been taken.

In this case, complainants allege that the defendants to the extent they participate in the transportation, maintain on sulphur in carload from Galveston and other origins in Texas to Danville, Illinois, joint rates over through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge and rail routes from Galveston to Danville, that as a result the existing rates and charges over barge and rail routes from Galveston to Danville are excessive and unreasonable; that it is necessary or desirable in the public interest for the defendants and complainants to establish such

Exam. Wilkins: Without objection, Exhibits 1 and 2 will be received in evidence and so marked.

(Complainant's Exhibits Nos. 1 and 2, Witness Hartmann, were received in evidence.)

Exam. Wilkins: You are excused.

(Witness excused.)

Exam. Wilkins: Anything further?

Mr. Belnap: Mr. Rogers.

WESLEY A. ROGERS was sworn and testified as follows:

Direct examination.

By Mr. Belnap:

Q. Will you state your name, your address and the Company with whom you are connected?

A. My name is Wesley A. Rogers. I am traffic manager for the American Barge Line Company, address 1520 Grant Building, Pittsburgh, Pennsylvania. I have been em- [fol. 46] ployed by the American Barge Line Company for the past eleven years, handling their various problems dealing with rates, divisions, and interstate commerce matters. Prior to my association with American Barge Line Company, I was employed in Chicago and St. Louis by the Wabash Railway for a number of years; and prior to that time I was with the Keeshin Motor Express Company in their rate department.

The American Barge Line Company in the latter part of 1948 established in connection with the Illinois lines a joint barge and rail rate from Port Sulphur, Louisiana, to Joliet, Illinois. And at various times since then has established from Port Sulphur, Louisiana, joint barge and rail rates to other Illinois points, including Danville, Illinois. Those rates are now carried in American Barge Line Company Tariff I.C.C. No. 99, in connection with which, the rail lines participating in the haul beyond East St. Louis concur.

The American Barge Line Company proposed to the

Illinois Freight Association, on or about March 23, 1950, that the existing barge and rail rates from Port Sulphur be extended to Galveston, Texas, on the accepted basis of $1.01 over the Port Sulphur joint rates. The Illinois Freight Association, in behalf of the lines serving Danville, recommended that their proposal be not concurred in, and consequently, the rates could not be established.

Mr. Day: This is just a repetition of the previous witness' testimony.

Exam. Wilkins: It seems to be some repetition.

[fol. 47] The Witness: I wanted to get in our tariffs, our publication and our handling.

Exam. Wilkins: Proceed.

A. (Continued:) For the years 1947, 1948, 1949, and 1950, the American Barge Line Company handled in millions of ton miles the following, all freight: 1,143, 1,431, 1,410, and 1,949; and the revenue from that tonnage in thousands of dollars for the same years, amounted to 3,326, 4,651, 4,807, and 6,278. Of those ton mile and revenue figures, the percentage of the sulphur revenue to the revenue obtained from all freight were, respectively: 16.6 per cent, 11.7 per cent, 10.5 per cent, and 10.6 per cent, with the percentage relationship cargo ton miles in sulphur to total ton miles for the same years: 18.9 per cent, 14.5 per cent, 12.5 per cent, and 12 per cent.

The American Barge Line Company uses a different system of computing mileages than the Federal Barge. Its mileages between the points involved, that is to say, from Galveston to the point of interchange with the rail line, East St. Louis, are carried in Agent Rogers Tariff 4-1-D I.C.C. No. 5.

Since the barges of the American Barge Line Company in the handling of its traffic, port to port are loaded to capacity, we feel that a figure in earnings of mills per ton mile are very significant. For the haul from Port Sulphur to East St. Louis, under our division of the rate from Port Sulphur to Danville, for the haul of 1,208 miles, the earn-

[fol. 48] ings are 3.6 mills per ton mile. That earning compares with sulphur rates to other points in the area under consideration.

As an example, to Calvert, Kentucky, about 60 miles

absorption made of the charge, transportation charge, from Galveston to New Orleans.

Q. Why does not a joint rate from Port Sulphur satisfy this concern at Danville?

A. Because the sulphur moving to Danville has, as far as I know, all moved from Galveston, Texas, and not from Port Sulphur.

[fol. 33] Q. Have you participated in any movement of sulphur from Port Sulphur to Danville?

A. None.

Q. Have you agreed division with the rail lines beyond St. Louis in connection with the $6.66 joint barge-rail rate from Port Sulphur?

A. We have.

Q. And what is the measure of that division?

A. Rail lines beyond East St. Louis receive $2.26 per gross ton.

Q. That leaves $4.40 for your water haul from Port Sulphur to East St. Louis?

A. That's correct.

Q. In connection with the proposed barge-rail rate from Galveston to Danville of $7.67, what is your plan as to the division to the rail lines beyond East St. Louis?

Mr. Day: I object to that. I don't think the bargeline will fix any division.

By Mr. Belnap:

Q. What are you going to suggest to them?

Mr. Day: I object.

Exam. Wilkins: It appears to the Examiner if they are going to propose this rate they are asking for, it is something they ought to know.

Mr. Day: I submit the division is not a matter for one party even if required to be established.

[fol. 34] Mr. Belnap: We appreciate that——

Exam. Wilkins: It is just information that——

Mr. Belnap: I want the Commission to be advised.

Mr. Day: We object to going into the question here. It is not involved.

Mr. Belnap: I appreciate that. I want the Commission

advised what we propose to give the rail lines, so they will know what is left for the water haul from Galveston to East St. Louis.

Exam. Wilkins: You mean if they don't accept the division you offer, you are going to withdraw from it?

Mr. Belnap: Not at all. We will fight that out from where we have to fight. We have an agreed basis for that division now from Port Sulphur, and it would seem to us that should be the same division out of Galveston. But if the rail carriers have a different idea, we will naturally negotiate with them, but are proceeding on that assumption at the present time.

Exam. Wilkins: For whatever it is worth, the Examiner will let it stand.

The Witness: The proposed rate of $7.67 per gross ton rate from Galveston to Danville, the proposed rail division beyond East St. Louis will be the same as the rail carriers beyond East St. Louis received out of the Port Sulphur rate, or $2.26 per gross ton.

[fol. 35] By Mr. Belnap:

Q. What would that leave to the barge lines which participate in the all water line up to East St. Louis?

A. $5.41 per gross ton.

Q. What does that rate earn per water ton mile?

A. Well, the distance from Galveston to East St. Louis is 1,406 miles, $5.41 per gross ton will result in 3.84 mills per ton mile.

Q. In your experience in handling traffic like sulphur, that is, the bargeload traffic, is an earning of 3.82 mills looked upon as reasonably compensatory for water service?

A. As you stated, on traffic such as bargeload quantities, it is.

Q. What is your all-water rate to East St. Louis from Galveston?

A. It should be $5.32, I believe.

Q. Don't you have it?

Mr. Day: We will stipulate it is 5.32.

A. (Continued:) It is right.

Mr. Day: That's right.

A. (Continued:) Five dollars and thirty-two cents per gross ton.

Q. Would there be any difference between the services the water carriers do render for that $5.32 rate as against what they would render on their part of a joint haul to Danville?

A. Well, at East St. Louis, the point of interchange with the rail carriers are on the Danville sulphur and the desti-
[fol. 36] nation on the local sulphur, there would be a difference as to the switching absorption and per diem and reclaim that would have to be absorbed by the Federal Barge Line.

Q. A difference, in what direction is the difference?

A. On the Danville traffic interchanged with the rail carriers, the switching charge, switching absorption by Federal would be less than on a local shipment, and the per diem on the rail equipment and the per diem and reclaim would be less; in fact, there would be no reclaim; there would be only per diem.

Q. And would those charges be borne out of the water line share of the joint rate, if established?

A. That's correct.

Q. Can you give us an approximate figure what the switching and per diem would be in connection with the joint movement?

A. On a local shipment, the switching would approximate thirty cents a gross ton. The per diem and reclaim would average about fifteen cents a gross ton.

Q. That would come out of the $5.32 local rate?

A. Out of the $5.32 local rate. On the Danville sulphur interchanged with rail carriers at East St. Louis, the switching would approximate probably twenty cents per gross ton; per diem would probably be eight or nine cents per gross ton.

Q. That $5.32 rate to East St. Louis includes delivery in rail cars at consignee's sidings?

A. That's correct.

[fol. 37] Mr. Day: Wait a minute. You don't mean that.

Mr. Belnap: That is what I thought.

Mr. Day: $5.32 is the water handling charge.

It includes the handling into the cars at the ports?

The Witness: At East St. Louis, and the absorption of switching charge to the industry.

By Mr. Belnap:

Q. But not the consignee's plant at Danville?

A. Oh no.

Mr. Day: He didn't say East St. Louis. The consignee here is the Danville receiver.

Mr. Belnap: If we are talking about a rate to Danville, which we were not at this time.

By Mr. Belnap:

Q. Do you have pending before the Commission at this time, Mr. Hartmann, an all-water rate on Sulphur from Port Sulphur to Dubuque, Iowa?

A. I have.

Q. Give the reference. That is a pending case, is it not?

A. That's correct. It is I&S Docket 5834, sulphur, Port Sulphur, Louisiana, to Dubuque, Iowa. Proposed report has been issued by the Examiner.

Mr. Day: I object to that, if your Honor please. I think it is incompetent and irrelevant. None of these defendants have any interest in rates to Dubuque from Texas sulphur points.

Mr. Belnap: I am going to have the witness tell about it. It is a case pending before the Commission and it is a [fol. 38] rate under suspension. But before this case is concluded, there will be some decision in that case.

Exam. Wilkins: You don't know that.

Mr. Belnap: Except it is an I&S case.

Exam. Wilkins: You are not offering the proposed report?

Mr. Belnap: Oh no, I am asking the witness to tell about that rate, what Federal proposes.

Exam. Wilkins: As a comparison?

Mr. Belnap: Sure.

Exam. Wilkins: For that purpose, we will let it stand. Proceed.

By Mr. Belnap:

Q. What is the rate proposal?

A. $4.80 per gross ton. The $4.80 rate applies from barge origin to in barge at Dubuque.

Q. The destination in that rate has a different application, does it not, than your five dollar thirty-two cent rate to East St. Louis?

A. That's correct.

Q. What will that rate earn? The one from Port Sulphur to Dubuque.

A. $4.80 rate, for a distance from Port Sulphur, Louisiana, to Dubuque of 1,504 miles, would earn 3.19 mills per ton mile.

Q. Now, in connection with the publication of that rate, did the corporation make a special study of the cost to it of transporting sulphur?

[fol. 39] A. It did.

Q. And as a result of that study, what did you find the cost to be for a haul of about 1500 miles?

Mr. Day: I object to that; it is second-hand testimony.

Exam. Wilkins: Again, is that for comparison?

Mr. Belnap: For comparison only.

Mr. Day: The witness hasn't shown he made a cost study. He said the Company made it or someone for the Company, but we had no opportunity to cross examine the man who made it.

Exam. Wilkins: Can he stand cross examination on it?

Mr. Belnap: On what was reported to him. That is all I am asking him to testify, what they told him was the cost.

Exam. Wilkins: Let him proceed temporarily then.

A. The cost that is showed that the cost was $4.03 per gross ton.

By Mr. Belnap:

Q. And was that an all inclusive cost, including return on investment of equipment?

A. It was; it included everything.

Q. Overhead?

A. All overhead, depreciation.

Exam. Wilkins: Is that all?
Mr. Belnap: Yes, that is all.
Exam. Wilkins: Any cross examination?
Mr. Day: We have a little.
Exam. Wilkins: Does anyone have any questions on cross
[fol. 40] examination?

Mr. Day: I have some.

Cross-examination.

By Mr. Day:

Q. Mr. Hartmann, I was a little surprised to hear you say you haven't handled any sulphur for Danville. Didn't you actually handle at least 88 cars in connection with the New York Central Railroad during the last six months of 1950?

A. If we did, Mr. Day, I am as surprised as you are. It is possible, but it is my understanding we haven't.

Q. And the New York Central is one of four lines serving Danville?

A. That is correct.

Q. Don't you know the Chicago and Eastern Illinois also handled cars in connection with your line for Danville?

A. No, sir, I don't.

Mr. Day, may I ask you—you seem to have the papers in front of you—is the Federal Barge Lines shown in there or is that another barge line?

Q. Well, of course, from the railroad standpoint, these are treated as originating at East St. Louis. It shows previous waybill reference Fox Terminal, East St. Louis. Does that mean anything to you?

A. Yes, sir. There has been a barge-rail movement of sulphur to Danville, but not by the Federal Barge Line.

Now, may we go off the record a minute?
[fol. 41] Q. Wait a minute. What does "TML" mean, if you know?

A. TML——
Q. Oh, that is Fox Terminal.

A. May we go off the record a moment. I would like to straighten it up. I want to get some information. I may be wrong, but I don't think I am.

Exam. Wilkins: Off the record a few minutes then.

(Discussion off the record.)

Exam. Wilkins: On the record.

By Mr. Day:

Q. During the discussion off the record, you said that any business that moved or that is moving from Texas by barge would be handled to East St. Louis by another barge line. What would that other barge line be?

A. This—the one I mentioned this morning, formerly Butcher-Arthur, now Commercial Petroleum Transport.

Q. So that that barge line has handled the traffic up to now; your Company has not participated in it?

A. That's correct.

Q. And you are not aware, I take it, that there is a substantial movement by barge?

A. No, I have no idea just how much tonnage is involved.

Q. And, as I say, it is a surprise to you there has been any barge movement at all?

A. No, my surprise was Federal had handled it, because I was positive that we had not.

[fol. 42] Q. Now, this so-called price differential, when sulphur moves by barge from Galveston, the differential being over Port Sulphur, has been explained as representing the handling by railroad and other handling facilities from the points where the sulphur is mined to Galveston, Texas. Is that correct?

A. I understand that it is not the cost of the transportation or the handling at Galveston, but a differential fixed by the sulphur producer with some basis on the cost. It is not the exact cost, itself.

Q. To refresh your recollection, in the cases going on in the past few days, it has been shown that part of that $1.50 charge represents a railroad charge of $1.10 for rail handling. Do you recall that?

A. I recall that that was given as the basis for it.

Q. And that the balance was the handling charge at Galveston?

A. Not the exact handling charge, Mr. Day.

Q. You don't recall that?

A. I recall just the opposite, that the $1.50 rate represents the handling end but is not the exact cost of handling it.

Mr. Belnap: I am willing to stipulate by reference in this record Mr. Robinson's testimony in the previous case, if it will be helpful.

Mr. Day: We don't want to make it as cumbersome as that.

All I am interested in is the price differential. If the witness will state the other items beyond the $1.10 rail rate [fol. 43] shown, that will be satisfactory.

Mr. Belnap: State it from Exhibit 50; that is Exhibit 50 in——

The Witness: I&S 5873. Wait a minute—which ones of these shall I use?

By Mr. Day:

Q. The items I am interested in is wharfage, loading from cars to bins and bins to vessels.

A. Wharfage eleven—these are in cents of gross tons—wharfage eleven cents, unloading from cars to bins thirty-seven cents, from bins to vessel or barge twenty-two cents, stevedoring 4.55 cents, pier rental 1.41 cents.

Q. The rail rate is $1.10 up to Galveston from the mines, isn't it?

A. That's correct.

Q. And all that the shipper charges the customer is a difference of $1.50 reflecting whatever the cost is from the mines up to Galveston; is that right?

A. That is correct.

Q. All right. Isn't it a fact there are no joint rates on any bulk commodities from Galveston or any other intracoastal canal points to Illinois points in connection with barge and rail lines?

A. From Galveston?

Q. Yes.

A. That is correct, so far as I know. I can't think of one [fol. 44] of them.

Q. Now, this 5.32 rate that you referred to as being in effect to East St. Louis, does not actually include the handling into cars, does it? Isn't that charge forty-four cents and isn't that in addition?

A. You mean at East St. Louis?

Q. Yes, on traffic moving to Danville.

A. Well, on traffic going to Danville, if the 5.42 local rate to East St. Louis——

Exam. Wilkins: 5.32.

A. (Continued:) I mean 5.32—were used in making the combination, that 5.32 rate would include the loading into the cars.

By Mr. Day:

Q. Well, let's not speculate on what might be; let's talk about it as it is today, and that is the way you were discussing it in your testimony. You referred to the rate as covering the entire handling into cars at East St. Louis.

A. That's correct.

Q. Now, isn't it a fact that it only includes the switching line at East St. Louis and that it does not include the 44 cents handling charge?

A. Mr. Day, I don't know whether I misunderstood you or not, but the 5.32 is local rate from Galveston to East St. Louis, and includes all accessorial and switching charges at East St. Louis. It is an inclusive rate and point of destination.

[fol. 45] Mr. Day: That isn't our understanding of it. We will show by the tariff what the situation is. Maybe he would rather not give it.

The Witness: No, if you are right and I am wrong, I am perfectly willing to admit it. But I am sure my statement is correct.

Mr. Day: That is all I have.

Exam. Wilkins: Any further questions?

Mr. Belnap: I have no redirect.

A. That's right.

Q. What is the rate to East St. Louis from Galveston, all-rail?

A. I believe it is 39 cents per hundred.

Q. It is shown on Mr. Hartmann's Exhibit 1, I believe, No, it isn't shown there—yes, it is. It is shown as $8.736—873.6 cents?

A. That's right.

Q. Do you make your through Danville all-rail by adding [fol. 64] the local rate of $2.95 to the $8.736?

A. No, sir.

Q. Why do it different with barge lines than rail connections?

A. We don't want to participate with the barge lines and reduce our earnings east of East St. Louis.

Q. You mean it gives you something less than your local rate?

A. That's right.

Q. Don't you participate on that basis with rail lines, taking something less than your local rate?

A. We do.

Q. Why not with the barge lines?

A. It will further reduce our earnings.

Q. The earnings of the line from East St. Louis over to Danville?

A. Yes.

Q. Why?

A. What you have offered, it is a reduction.

Q. From your $2.95?

A. That's right.

Q. And that is the basis of your defense here?

Mr. Day: I object to that.

By Mr. Belnap:

Q. That is the basis of your objection to joining in the rate proposed?

A. That's right. We don't want to receive on earnings on barge traffic anything less than $2.95 east of East St. Louis.

[fol. 65] Q. In that respect you want to treat barge lines differently than you do rail lines?

from Cairo, Illinois, is on a basis of 3.6 mills for a haul of 1,094 miles, and to Joliet, Illinois, for a haul of 1,535 miles on a 3.4 mill basis.

In our contact with the receiver of the sulphur and through other information obtained through the ordinary course of business, we understand that the tonnage involved at Danville approximates 20,000 tons per year, all shipped from Galveston, Texas. We further understand that the receiver controls the routing, and that for the past two or three months, that it has moved via all rail routes from Galveston. It is our further understanding that if the joint rate proposed is established, that we can expect to share to some extent in this movement.

By Mr. Belnap:

Q. The shipper so advised you?
A. Yes,—the consignee.
Q. The consignee at Danville?
A. At Danville, yes.

I believe that is all I have on direct.

Exam. Wilkins: Any cross examination?
Mr. Day: I have no questions.
Exam. Wilkins: Any questions?

(No response.)

Exam. Wilkins: Anything on redirect?
[fol. 49] Mr. Belnap: Nothing.
Exam. Wilkins: You are excused.

(Witness excused.)

Exam. Wilkins: Any other witnesses?
Mr. Belnap: Complainants rest.
Exam. Wilkins: Defendant may proceed.
Mr. Day: Call Mr. Sweet.

Mr. Day: Mr. Examiner, Mr. Sweet was only called as a witness to give facts, not to set the policy of any of these Danville Lines, and I am going to straighten out the matter of whether he has authority to commit these defendants to join in through rates with the barge lines. I am sure he hasn't got it. We do oppose and resist the establishment of joint rates with the barge lines.

By Mr. Belnap:

Q. As to the movement of sulphur to Danville, has Galveston been the origin for all sulphur received at that point or the Texas mines?

A. That's right.

Q. Is the present movement entirely by the all-rail routes?

A. I don't know. I made a check of the last six months in 1950.

Q. Did you make a——did you take a look at what the present situation is?

A. No, sir, I didn't.

Mr. Belnap: Do you have somebody who will know about the present movement, Mr. Day?

Mr. Day: Present movement?

Mr. Belnap: Yes. How it is moving today.

Mr. Day: I don't think so.

By Mr. Belnap:

Q. How did you happen to quit looking?

[fol. 66] A. I just took the last six months; that is fairly representative.

Q. Is that the same as today?

A. I assume it would be representative.

Q. You don't know whether it is comparable with what is going on today?

A. No, I don't know what is going on today.

Q. On your Exhibit 6, you have some percentages there called percentage of circuity. Would it be more accurate to say that is the relation of the water miles in the barge routes to the short rail miles?

A. That's right. The line of the barge is 85½ per cent of the short line rail from Galveston to East St. Louis.

R. L. SWEET was sworn and testified as follows:

Direct examination.

By Mr. Day:

Q. Will you state your name and occupation.

A. My name is R. L. Sweet; I am chief of the Commerce Bureau, 521 LaSalle Street Station, New York Central Railroad Company, Chicago, Illinois.

Q. What has been your railroad experience?

A. I have been with the New York Central Railroad for the past twenty-five years, all of which has been spent in the traffic department with the exception of 8 years, handling rates and, prior to that, I was with the Wabash Railroad for seven years in their rate department.

Q. In other words, in all but eight years of your experience, you have been actively handling rate and tariff matters?

A. That's right.

Q. You are familiar with the rates involved in this proceeding?

A. Yes, sir, I am.

[fol. 50] Q. Are there any joint barge-rail rates in effect from Texas points to Danville?

A. No, not to my knowledge, there has never been published any rate of any character, barge-rail, from Texas ports to Danville or to any other point in Illinois.

Q. In Paragraph 4 of the Complaint, the complainant refers to a reduction made in all rail rates on sulphur from Galveston and other Texas points and from Port Sulphur, Louisiana, to Danville. Did such a reduction ever take effect?

A. No. These rates were suspended in I&S Docket 5880, and in the proceedings have been cancelled.

Q. Have you prepared a rate history covering rates on sulphur between the points involved?

A. I have.

Mr. Day: That will be No. 3, won't it?

Exam. Wilkins: Yes.

(Defendant's Exhibit No. 3, Witness Sweet, was marked for identification.)

By Mr. Day:

Q. Will you proceed to explain your Exhibit No. 3.

A. My Exhibit No. 3 shows the history of the sulphur rates from East St. Louis, Illinois, to Joliet, and Danville, Illinois. It will be observed, effective May 11, 1936, $1.69 rate was established to Joliet, Illinois, to meet barge competition. However, this rate was not made applicable by the Railroad Company until June 15, 1936, at which [fol. 51] time the Joliet rate was applied to the Danville under the intermediate application of the tariff.

On March 14, 1945, the rate was published specifically to Danville on the Joliet basis. This rate, however, was not sufficiently low to secure the tonnage and some of the Illinois lines in order to meet Illinois River barge competition, further reduced the rate to $1.65 a gross ton. This rate, however, was suspended by I&S Docket 5499.

After hearing, the Commission found the $1.65 rate not justified and the $2.23 rate was continued in effect.

Since then, the various increases, the rate became $2.95 per gross ton to Joliet and Danville.

Q. What is the general basis of sulphur rates prevailing as an eastern factor, sulphur handled by eastern lines and eastern territory?

A. The exception rating of 23 and one half per cent.

Q. And what is the basis prevailing generally as the normal basis on sulphur from southwestern origins to destinations in official territory when moved all-rail?

A. Column 13 and one half.

Q. Has that basis been approved by the Commission?

A. It has.

Q. In some recent cases?

A. Yes.

[fol. 52] Q. Will you cite one or more of them?

A. Well, in the Marian case, in Docket 29856, 274 I.C.C. 493, involving rates on sulphur out of the Southwest to Indianapolis and Columbus, Ohio, they held Column 13½ was the normal, reasonable rate.

Q. What relation does the current all-rail rate have to the first class to Danville?

A. From Texas?

Q. From Texas producing——

A. It reflects 8.6 per cent of the current first class rate.

Q. And what is the present?

A. Forty-one cents a hundred.

Q. What is the relationship to first class to the rate to East St. Louis and to Danville?

A. That reflects 9.2 of the first class.

Q. Will you explain why the present all-rail rate from Galveston to Danville is depressed?

A. Well, the Southwestern Lines, under their emergency proposal 372, effective June 7, 1933, reduced their rates from Texas producing points and Port Sulphur, Louisiana to Chicago by seven and a half cents a hundred pounds, or 27½ cents, to meet barge competition. Through the various increases, this 27½ cents has come to being 41 cents current, today.

Q. In other words, the 27½ cent rate was established to Chicago, then applied to Danville under the intermediate [fol. 53] clause of the tariff?

A. That's right.

Q. And under the general increases in 123, 166, and 168, that rate has become 41 cents today?

A. Yes, sir.

Q. Will you explain the rate of $8.62 per gross ton from Texas producing points to Danville?

A. Effective December 24, 1950, in Supplement 57 to Southwestern Line Tariff 102, Line W, Agent Marsh I.C.C. 3862, carries issued rate of 38½ or 862 per gross ton on crude sulphur from Texas producing points and from Port Sulphur, Louisiana to Danville, Illinois, to meet barge competition. This rate was predicated on a waterway transportation incorporation charge of $4.65 per gross ton from Texas ports to East St. Louis, plus our $2.95 a gross ton from East St. Louis to Danville, added to the switching charges of 40 cents per gross ton of the Alton & Southern Railroad at St. Louis, Missouri, this produced a through barge-rail rate of $8.00 per gross ton.

Q. That 38½ cents you referred to was suspended by the Commission in I&S 5880 and subsequently withdrawn by the carrier?

A. That's right.

Q. While you are on that point, will you state the tariff

authority for the handling charge at East St. Louis in addition to the—you have the tariff with you?

A. It isn't a tariff. It is published by the Cooper Termi-
[fol. 54] nal, Inc. at East St. Louis.

Q. And the charge is——

A. Thirty-nine cents a net ton, or 44 cents a gross ton.

Q. And that is in addition to the transportation charges?

A. Yes, sir.

Mr. Belnap: Whose transportation charges?

Mr. Day: He gave you the reference to it.

Mr. Belnap: Whose transportation charge is that in addition to?

The Witness: Federal Barge and the railroad in connection with your $5.32 to East St. Louis mentioned a few minutes ago.

Mr. Belnap: Where is your tariff reference that that is in addition to the rate?

The Witness: Oh, that——

Mr. Belnap: That is the one you better find.

The Witness: Yes, sir. Supplement 49 to Federal Barge Tariff 66-U, I.C.C. No. 265, Item 980-D, is a $5.32 gross ton published from Galveston, Texas to East St. Louis, tagged with a circle reference No. 3 which reads as follows: (reading)

"The rate applies from in barge (See item 390 at origin) and will include switching charges lawfully on file with the Interstate Commerce Commission at East St. Louis or Memphis, Tennessee as the case may be."

Now, referring to Item 390 in the tariff, it says: (reading)
[fol. 55] "Rates are published for application from in barge or to in barge, such rates apply for line haul applications only and do not include cost of loading into barge at port or origin or unloading from barge at point of discharge, as the case may be, nor do they include switching other than terminal charges."

By Mr. Day:

Q. Wait a minute. You read that wrong. "Nor do they include switching or other terminal charge."

A. That's right. Circle 3 absorbs the switching but not the handling charge.

Mr. Belnap: It says when rates are published from in barge, certain things apply, and to in barge, certain things apply.

The Witness: That's right.

Mr. Belnap: You understand this is published to in barge?

The Witness: Sure.

Mr. Belnap: You can't read the tariff, sir.

Mr. Day: Now, I object to that. I think the witness is as capable of reading the tariff as anyone.

Mr. Belnap: I don't dispute his eye sight. I dispute his understanding of the words.

Mr. Day: Well, I disagree with you.

Mr. Belnap: Just looking at that same item you gave reference to, you find some of the rates in that item published to in barge, do you not, Mr. Witness?

The Witness: The $5.32 rate applies in barge from Gal- [fol. 56] veston, Texas to East St. Louis, Illinois.

Mr. Belnap: How does it apply to in barge? Is that the way you understand it?

Mr. Day: We can quibble about this all day.

Mr. Belnap: I would like to have the witness look at the tariff——

Mr. Day: I think we can argue in briefs if there is any question about the interpretation of it.

Mr. Belnap: I asked whether or not he finds some rates which are said to apply to in barge destination.

Exam. Wilkins: He can answer that.

Can't you?

By Mr. Day:

Q. Have you got the tariff there? Read the rate application please, to satisfy Mr. Belnap.

A. The aplication of 390, is that what you mean?

Q. The $5.32.

Mr. Belnap: Do you find some place in there they use the words "to in barge"?

Mr. Day: Don't let's get too far afield.

By Mr. Day:

Q. We are talking about the $5.32 rate on sulphur from Galveston to East St. Louis. Stick to that and tell Mr. Belnap what the tariff provides as to the application of that rate.

Mr. Belnap: You read Item 3, did you not?

The Witness: Yes.

[fol. 57] Mr. Day: And he read Item 390.

Mr. Belnap: I want him to contrast that application with Circle Reference 7, which reads to Dubuque, for instance.

Mr. Day: I object to that. We can't discuss every item in the tariff.

Mr. Belnap: I asked the witness to read me Circle 7 for the purpose of pointing out the difference in the language.

Mr. Day: I submit that is not involved; it is altogether immaterial and irrelevant. You question the witness' interpretation of the tariff, and in the interest of expediting the thing I permitted you to continue. I thought if there was anything stated in the tariff applying to this rate that wasn't clear to you, the witness would read the exact language of the tariff for you so you could understand it.

Mr. Belnap: I am asking the witness to contrast this language with another note to show how wrong ye : ar

Mr. Day: I object to going to Dubuque, Kansas City, Minneapolis or any place else. I don't think we are concerned with that. We are concerned with the rate from Galveston to East St. Louis.

Exam. Wilkins: Can you tell the Examiner; is that rate from Galveston to East St. Louis and state that it applies in barge to East St. Louis?

The Witness: Yes, that is the way it applies.

Exam. Wilkins: Let's have the language.

[fol. 58] The Witness: You have $5.32 rate into East St. Louis——

Mr. Rogers: I think we can straighten this out if you go off the record a few minutes.

Exam. Wilkins: Off the record.

(Discussion off the record.)

Exam. Wilkins: On the record.

Mr. Belnap: May the tariff be stipulated in by reference, the Federal Barge Line Tariff?

Exam. Wilkins: Is it filed with the Interstate Commerce Commission?

Mr. Belnap: Yes, sir.

Exam. Wilkins: Can you furnish the Examiner with a copy for ready reference?

Mr. Rogers: Since that situation has developed, may we also stipulate the American Barge Line Tariff?

Mr. Day: I submit that can be put on rebuttal if counsel wants to throw in some other tariffs. Let's not complicate this testimony any more.

Exam. Wilkins: Are you going to put it in in rebuttal?

Mr. Belnap: No, I am going to stipulate Oliphant's I.C.C. No. 265, stipulate the tariff in by reference.

Exam. Wilkins: Proceed—we will take a short recess.

(Short recess.)

Exam. Wilkins: We will resume, gentlemen.

By Mr. Day:

Q. Will you explain your statement marked——

[fol. 59] Exam. Wilkins: That is Exhibit 4.

(Defendant's Exhibit No. 4, Witness Sweet, was marked for identification.)

By Mr. Day:

Q. Will you explain your statement marked Exhibit 4 for identification.

A. My Exhibit No. 4 is a statement of rates ex barge on sulphur to destinations in Illinois and Indiana, and its purpose is to demonstrate the rate of $2.95 per gross ton from East St. Louis to Danville, Illinois, a distance of 181 miles is not unreasonable or out of line with other ex barge rates maintained to other destinations shown in the exhibit.

It will be noted the rate on 236 miles to Indianapolis is $6.50 per gross ton, and indicates that the Danville rate is a depressed rate.

Q. Did you make a study of the movement of sulphur

into Danville during the last six months of 1950?

A. I did.

Q. Via the New York Central Railroad?

A. Yes, sir. I called——

Q. And will you state whether the preponderance of that traffic came all-rail or barge-rail?

A. I secured the inbound expense bills——

Q. Just answer the question.

A. The preponderance was by barge up to East St. Louis and rail to Danville.

[fol. 60] Q. And that is for the New York Central Railroad?

A. Yes, sir.

Q. Do you understand the C&EI also has a substantial movement?

A. They did.

Mr. Day: I am asking him to save time and save the witness. Mr. McWilliams, a witness for C&EI is here and would so testify.

Mr. Belnap: That is satisfactory.

By Mr. Day:

Q. Now, take up your next exhibit.

Exam. Wilkins: That is No. 5.

(Defendant's Exhibit No. 5, Witness Sweet, was marked for identification.).

A. Exhibit No. 5 is a comparison of the barge-rail costs with the all-rail rate from Galveston, Texas to Danville, Illinois. By the route of the Waterways Transportation, Inc., contract carrier charge from Galveston to East St. Louis, including transfer from barge to cars is $4.65 a gross ton. Switching at East St. Louis, Illinois is 40 cents a gross ton. Rail charge from East St. Louis to Danville is $2.95 a gross ton, or through, $8.00 a gross ton.

The barge rate from Galveston to East St. Louis by the Federal Barge connection with the conjunction with Coyle or DCI barges from New Orleans, Federal——

By Mr. Day:

Q. DCI is the Dixie Line?

A. That's right.

[fol. 61] Q. Well, just give the aggregate figure; the items are shown on the exhibit.

A. $5.32, handling charge at East St. Louis 44 cents a gross ton——

Q. That is what Mr. Belnap doesn't agree with.

A. Rail charge of $2.95, or through charge of $8.71, compared with the all-rail to Danville, Illinois of $9.18.

Q. That is enough. The exhibit otherwise speaks for itself.

Take up your Exhibit 6 and make such explanation as you think necessary. You don't have to read the figures.

(Defendant's Exhibit No. 6, Witness Sweet, was marked for identification.)

A. Well, Exhibit 6 is a statement showing, or comparing the all-rail mileage with the barge-rail distance from Galveston, Texas, to East St. Louis and Danville, Illinois, indicating the percentage of circuity of the barge-rail distance over the all-rail distance. Short line by rail is 823 miles compared with the short line of 1,518 by the barge, or——

Q. You don't have to read that. That is all on there, Mr. Sweet.

A. You just want percentage of circuity?

Q. No, I think you have explained sufficiently what the exhibit is.

A Witness for the complainant referred to a differential of $1.01 Galveston over Port Sulphur. Is there any such [fol. 62] differential in connection with rail rates?

A. No, sir.

Q. To any destination?

A. No, sir.

Mr. Day: That is all.

Exam. Wilkins: Cross-examine.

Cross examination.

By Mr. Belnap:

Q. *Do the defendant railroads object to joining the complaining barge lines in through routes at a single factor joint rate on sulphur from Galveston by East St. Louis to Danville?*

A. I don't think so, if we get our $2.95 east of East St. Louis.

Q. You are willing to *join a single factor through rate?*

A. I wouldn't be in position to say that, but I don't think there would be any quarrel with lines east of East St. Louis if they get their $2.95.

Q. Is that a local rate?

A. It is a proportional rate, so to speak.

Q. Published as a proportional rate?

A. Published as an interstate rate, which has the same effect.

Q. Like the ordinary published international local rate?

A. The routes on the $2.95 are all interstate routes so the traffic has to come beyond East St. Louis to make it interstate.

Q. It is published as any other ordinary local rate?

A. That is true, for any interstate application.

[fol. 63] Q. Is that also true of all rates shown on your Exhibit 4 which you had as ex barge rates?

A. That's right.

Q. Just local rates?

A. That's right.

Q. Now, in making the through all-rail rates from Galveston to Danville in connection with your lines, do you add $2.95 to the rail rate up to East St. Louis to make the through charge?

A. That's right.

Q. That is the way you make it?

A. That's right.

Q. What is the rail rate to East St. Louis?

A. Oh, the rail rate; I thought you said the barge rate. We have a through rate from Texas producing points to Danville.

Q. $9.18 per gross ton?

EXHIBIT 2

PROPOSED RAIL ROUTES FROM NEW GULF, TEX.

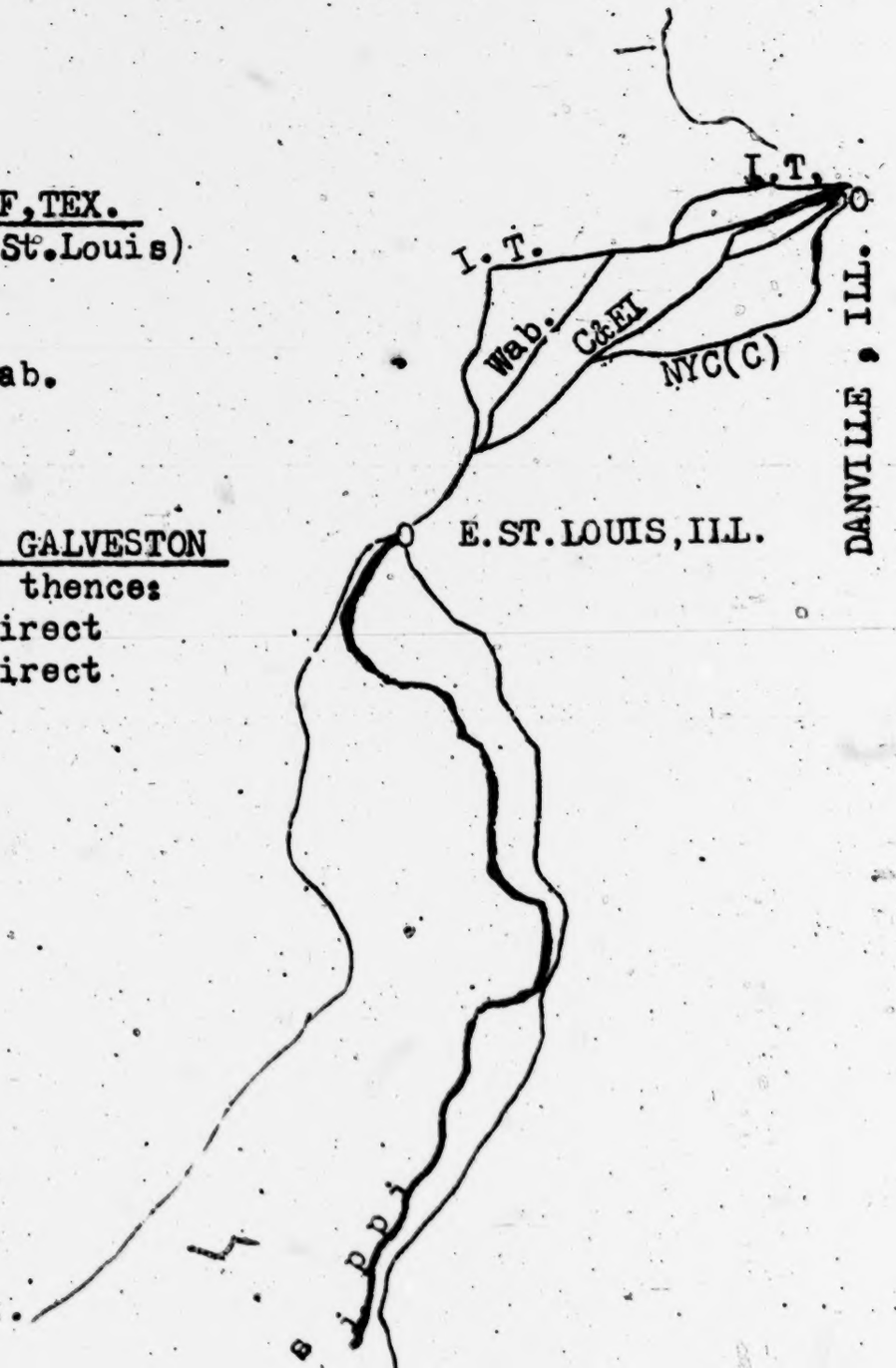
A - S.P.(Shreveport) T&P(Texarkana) MP(St.Louis) C&EI(Glover) IT

B - S.P.(New Orleans) IC (E.St.Louis) Wab.

PROPOSED CANAL-BARGE-RAIL ROUTES FROM GALVESTON

Canal (New Orleans) Barge (E.St.Louis) thence:

A - C&EI direct
B - I.T. direct
C - NYC(C) direct
D - Wabash direct



Q. Is the route from Galveston to Danville via New Orleans, thence via East St. Louis looked upon as a normal route if the rail lines were operating it?

A. I didn't understand the question.

Exam. Wilkins: Read the question.

(Question read.)

A. No. Oh, it could be considered as such, yes, sir.

Q. Just the usual type of route for that traffic?

A. Well, this sulphur traffic generally is routed through Thebes, Cairo, East St. Louis and Kansas City by the direct sulphur lines.

Mr. Belnap: That is all the questions I have.

[fol. 67] Exam. Wilkins: Any further questions on cross examination?

Mr. Macleay: I have one or two.

By Mr. Macleay:

Q. Referring to your Exhibit No. 5, do you have any tariff authority for the rate you quote there via Waterways Transportation, Inc.?

A. No, sir, that is a contract rate.

Q. Where did you get that information?

A. That information was the result—I mean, this particular rate was the result of the Southwestern Lines' filing their proposal for reduced rates to Danville.

Q. This was the result of your filing?

A. Southwestern Lines filing their proposal to reduce the rates to Danville, now on suspension 55-A. That was the factors used up to East St. Louis.

Q. You haven't told me where you obtained that rate quotation.

A. From the sources of the Southwestern Lines.

Mr. Day: It is in your files and records?

The Witness: Yes.

By Mr. Macleay:

Q. How did it get in your files and records? It is not a published rate of any kind, is it?

A. That's right. It is information we had from the

Southwestern Lines in justifying the reduction in the all-rail rate to Danville.

Q. That proposed reduction has been withdrawn?

A. That's right.

[fol. 68] Q. Is that because that competition has disappeared?

A. I don't know why the tariff was withdrawn.

Mr. Day: It was suspended. You know that.

The Witness: It was suspended.

By Mr. Macleay:

Q. Then it was withdrawn?

A. That's right.

Q. In other words, you are no longer trying to reduce your rates to meet this particular competition?

A. No, sir, trying, just trying to show there is $4.65 rate to East St. Louis.

Q. You can't give us any tariff authority there is any such rate?

A. It is a contract rate.

Q. There are contract rates on file with the Commission; aren't they?

A. Not that I know of.

Q. Don't you know minimum rate schedules of carriers having permits as contract carriers must be filed with the Commission?

A. Yes, file a minimum rate.

Q. You don't know whether or not there is any such rate on file with the Commission?

A. No.

Q. Do you know whether Waterways Transportation, Inc. has any rates on file with the Commission at the present time?

A. No, I don't.

[fol. 69] Q. Do you know whether or not Waterways Transportation, Inc. is in operation at the present time?

A. No, I don't. Just what I have in the files is all I have.

Q. And you don't know where this $4.65 quotation came from?

A. Yes, I told you where it came from.

Q. I mean, you don't know where the railroads obtained any such information?

A. No, sir.

Q. That is something some other railroad passed along to you?

A. The origin lines.

Mr. Day: To the destination lines?

The Witness: To the destination lines.

By Mr. Macleay:

Q. Not the origin lines handling it via Waterways Transportation.

A. No. The origin lines, the railroad lines that originate the sulphur.

Q. But you don't know where they obtained any such information?

A. No, sir.

Q. Referring to Exhibit 6—not that it has any real effect on the result of your percentages—but do you know that the Coyle Lines tariff 4 I.C.C. No. 4, which is the mileage tariff to which you apparently referred to get the distance from Galveston to New Orleans, was canceled several years ago?

A. That tariff is still on file with the Interstate Commerce Commission and that is where we obtained our information.

[fol. 70] Q. Physically filed but canceled?

A. It runs the same course.

Q. You know that mileage is not exactly accurate today.

Mr. Day: We will accept your figure.

Mr. Macleay: 354 miles from Galveston to New Orleans.

Exam. Wilkins: Instead of 363.

Mr. Belnap: Mr. Harmann gave the correct mileage from New Orleans to East St. Louis which is different from the mileage shown here.

Mr. Day: As I understand, you want to substitute 354 for 363.

Mr. Macleay: Merely for accuracy: Because this might be cited by someone else.

Mr. Day: And do you have the tariff authority for the 354?

Mr. Macleay: There is no tariff authority for those mileages today. The tariff setting forth the mileage was canceled and the Army Engineers' publications are now used to establish the mileages.

That is all I have. Thank you.

Exam. Wilkins: Any further questions?

By Mr. Rogers:

Q. On your Exhibit 5, you show the American Barge Line rate to East St. Louis as $5.32, and at the bottom, the authority as ABL Tariff I.C.C. 99. Do I understand that it is your contention that the East St. Louis rate is in that tariff which you cite?

[fol. 71] A. Well, I understood it was in that tariff.

Q. Did you examine that tariff?

A. I didn't personally, no, but under my supervision.

Q. I hand you this copy of the American Barge Line I.C.C. No. 99——

Mr. Day: Why don't you put that in yourself?

Mr. Rogers: I can do that.

Mr. Day: It is your tariff. You know more about that than he does.

Mr. Rogers: All right. I will be glad to do that.

Exam. Wilkins: Anything further? Any further questions on cross examination?

(No response.)

Exam. Wilkins: Redirect?

Mr. Day: Yes, sir, a couple.

Redirect examination.

By Mr. Day:

Q. You were questioned about the shipments of sulphur handled by barge during the last six months of 1950 and as to why you used that particular period. Was the notice of this hearing served on you in January of this year?

A. That's right, yes, sir.

Q. And you immediately set to work to prepare your defense to the complaint?

A. Yes, sir.

Q. Were those the latest figures available when you prepared this information?

[fol. 72] A. Yes, sir.

Q. Now, Mr. Sweet, you are not authorized to say that you will join in rates with the barge lines under any terms, are you?

A. That's right, yes sir.

Q. And do you want to retract what you stated to Mr. Belnap about being willing to accept a division of the rate?

A. I said I didn't think the carriers would quibble; but this would have to be legislated by the Illinois roads before the establishment of any through rate could be published.

Q. And you are not authorized to say you will join in through rates under any terms or conditions?

A. That is absolutely right.

Mr. Day: That is all.

Recross-examination.

By Mr. Belnap:

Q. Are you authorized to state the basis of the objections the carriers have to joining a through rate?

A. No, sir.

Q. You aren't authorized to state those?

A. No, sir.

Q. So you haven't stated any?

Mr. Day: He has just prepared the defense to this complaint.

Exam. Wilkins: These exhibits, 3 through 6, are received [fol. 73] in evidence and so marked.

(Defendant's Exhibits Nos. 3 through 6, inclusive, Witness Sweet, were received in evidence.)

Exam. Wilkins: You are excused.

Witness excused.

GEORGE T. BARRY was sworn and testified as follows:

Direct examination.

By Mr. Day:

Q. State your name, occupation and place of address.

A. George T. Barry, 1463 Railway Exchange Building, St. Louis, Missouri. I am commerce agent of the Wabash Railroad Company, and I have been in the employ of the Railroad for about 32 years, entirely in the traffic department.

Q. Having to do with rates and tariffs?

A. Yes. Practically all my experience, with the exception of about five years, was having to do with rates and tariffs. And those five years I was in solicitation.

Q. You are familiar with the rates involved in this case?

A. I am.

Q. Have you prepared an exhibit?

A. Yes, I have. And I would like to make some corrections at this time.

Exam. Wilkins: It will be marked Exhibit No. 7 for identification.

[fol. 74] (Defendant's Exhibit No. 7, Witness Barry, was marked for identification.)

A. (Continued:) The correction is, please eliminate the star references under the route in the last column, and that route 15 there, as shown in the original tariff is via Wabash.

My Exhibit No. 7 is an excerpt from Supplement 1 to Wabash I.C.C. 723, effective January 12, 1951, showing $2.95 rate on sulphur from East St. Louis, Illinois to Danville, Illinois, which is the amount Wabash, apparently, receives on sulphur carloads from East St. Louis, Illinois to Danville, Illinois on shipments of sulphur originating at Galveston, Texas and moving by the barge lines or water routes to East St. Louis, Illinois. We are—the Wabash is opposed to the establishment of a barge-rail rate, a joint barge-rail rate for the reason we are fearful this will have the effect of reducing our present revenue of $2.95.

Q. Have you authority to agree to a joint barge-rail rate under any division or conditions?

A. I have no authority to do any such thing, Mr. Day.

Q. Your instructions were to defend the $2.95 rate?

A. That is correct.

Q. And your company participates in some barge-rail movement to Danville, do they?

A. Yes, we do.

Mr. Day: That's all.

[fol. 75] Exam. Wilkins: Any questions?

Cross-examination.

By Mr. Belnap:

Q. In making all-rail rates to Danville, do you add your local rate of $2.95 in making that through rate?

A. No, sir, we do not.

Q. But you would like to do that with the water lines?

A. Well, we want $2.95.

Q. From the water lines, water traffic?

A. We want this $2.95; this is what we want.

Q. If it moves by barge, you want $2.95?

A. We want $2.95.

Q. That is, you will do something different if it moves by rail?

A. I don't know what we might do if it moves by rail.

Q. Isn't traffic moving today by rail?

A. Yes.

Q. And do you demand $2.95 on that all-rail traffic?

A. I imagine; I don't know.

Q. But you don't make your through rate by adding that $2.95?

A. That is true.

Mr. Belnap: That's all.

Exam. Wilkins: Any further questions?

(No response.)

Exam. Wilkins: If not, Exhibit 7 is received in evidence and so marked.

[fol. 76] (Defendant's Exhibit No. 7, Witness Barry, was received in evidence.)

Exam. Wilkins: You are excused.

(Witness excused.)

Mr. Day: If the position of the defendants on this question isn't clear, Mr. Examiner, I would like to state the defendants are definitely opposed to entering into joint rate arrangements with the barge lines.

Exam. Wilkins: Anything further to be presented?

Mr. Belnap: That's all.

Exam. Wilkins: Are the parties finished with the presentation?

Mr. Day: Yes.

Exam. Wilkins: Will the parties desire a proposed report?

Mr. Day: Yes, sir.

Exam. Wilkins: Proposed report will be issued.

Do the parties desire to file briefs?

Mr. Day: Yes, sir.

Exam. Wilkins: What time do you require for filing briefs?

Mr. Belnap: Sixty days.

Mr. Day: Yes, I say "amen" to that.

Mr. Belnap: May 20 or May 21.

Mr. Day: Defendants join in that request.

Exam. Wilkins: Let the record show because of commitments of counsel, they indicate it is necessary that briefs not be filed before May 21, therefore, the date for briefs [fol. 77] is fixed for May 21.

If there is nothing further, the hearing in this proceeding is closed.

(Whereupon, at 4:30 p.m., the hearing in the above-entitled matter was closed.)

[fol. 78]

EXHIBIT 1

Present Rates
(in cents per ton of 2,240 pounds)
on
Sulphur (Brimstone)
Crude (Unground and Unrefined)
(Minimum weight 500 tons of 2,240 pounds, except as noted)

To	From	Barge-Rail Rate	Barge-Rail Route	All-Rail Rates From Port Sulphur, La.	All-Rail Rates From Galveston, Tex.
Chicago, Ill.				918.4	918.4
Chicago Heights, Ill.				918.4	918.4
Dyer, Ind.				[2]	1187.2
East Chicago, Ind.				918.4	918.4
Gary, Ind.		672	c, e	918.4	918.4
Hammond, Ind.	New Orleans, La.			918.4	918.4
Hartsdale, Ind.	Baton Rouge, La.			918.4	918.4
Indiana Harbor, Ind.				918.4	918.4
South Chicago, Ill.				918.4	918.4
East St. Louis, Ill.		[1] 460	c	873.6	873.6
Mooar, Ia.		[1] 785	e	918.4	918.4
Clinton, Ia.		778	e	918.4	918.4
Dubuque, Ia.		[1] 778	c, e	918.4	918.4
Chicago Heights, Ill. Danville, Ill. Joliet, Ill. LaSalle, Ill. Streator, Ill.	Port Sulphur, La.	666	e	918.4	918.4

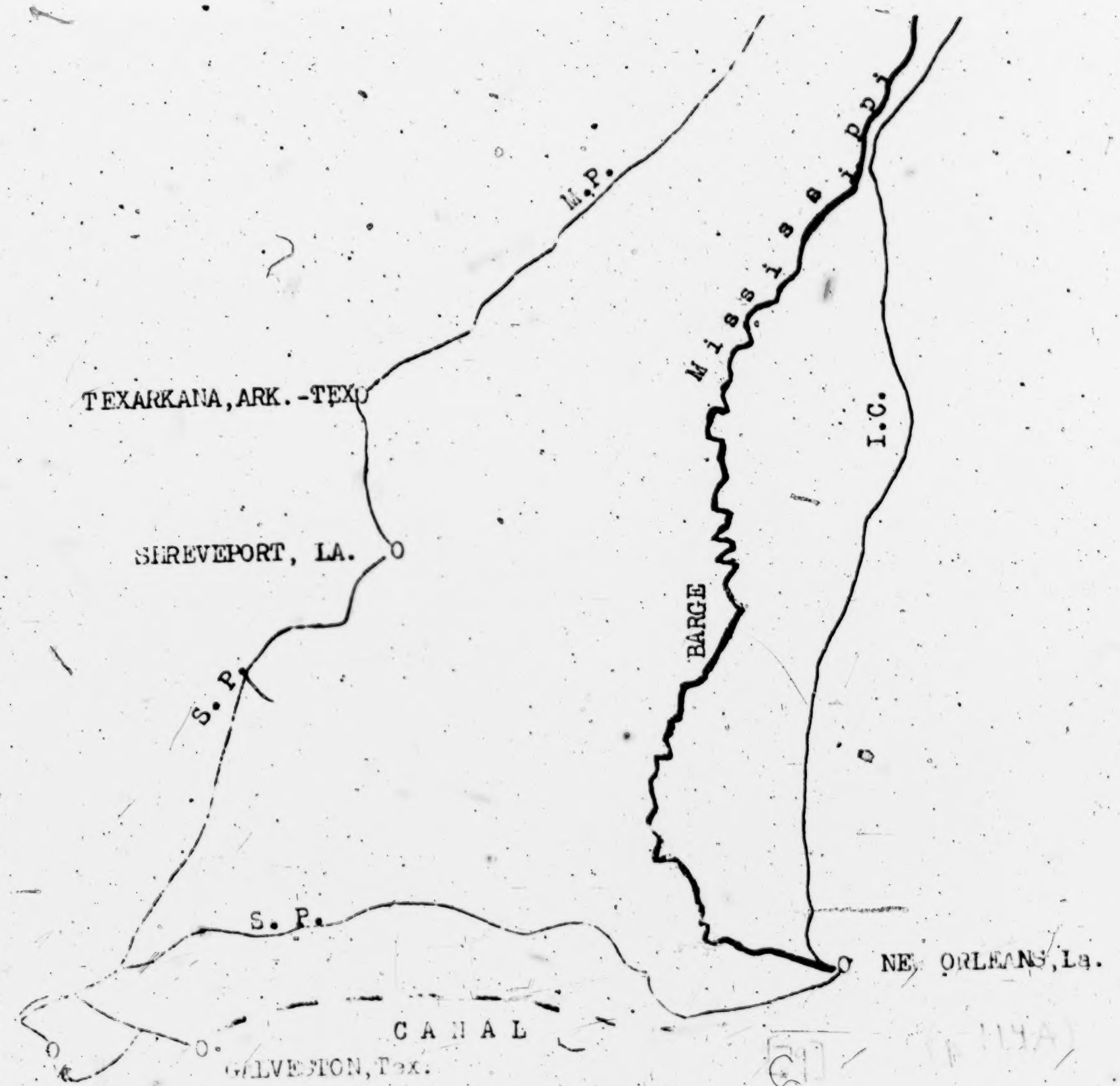
[1] Minimum weight: 1,500 tons of 2,240 pounds.
[2] Class basis only.

Route c—Via FBL (Cairo, Ill.) rail lines.
Route e—Via FBL (East St. Louis, Ill.) rail lines.

Tariff Authority

F.B.L.-F.T. No. 27-J, I.C.C. No. 283.
S.W.L. F.T. No. 102-W, Agent D. Q. Marsh's I.C.C. No. 3682

(Here follows 1 Photolithograph, side folio 79)


M.P.
TEXARKANA, ARK.-TEX
SHREVEPORT, LA.
S. P.
S. P.
Mississippi
I.C.
BARGE
NEW ORLEANS, La.
CANAL
GALVESTON, Tex.

[fol. 80] EXHIBIT 3

Chronological History
of
Interstate Rates on Sulphur (Brimstone), Crude (Ungroind and Unrefined) In Bulk, Minimum Weight 89,600 Pounds, From East St. Louis, Ill. To Danville and Joliet, Ill.

Date	Destination		Rate in Cents Per Gross Ton	Authority
5/11/36	Joliet	Ill.	169	Item 3375, Supp. 53, Agent Raasch's I.C.C. No. 286.
6/15/36	Joliet	Ill.	169	Item 3375-A, Supp. 54, Agent Raasch's I.C.C. No. 286.
	Danville, Ill, Intermediate			
3/28/38	Joliet	Ill.	186	Supplement No. 17, Agent
Ex Parte 123	Danville, Ill. Intermediate			Raasch's I.C.C. No. 371.
3/18/42	Joliet	Ill.	197	Supplement No. 36, Agent
Ex Parte 148	Danville, Ill. Intermediate			Raasch's I.C.C. No. 481.
5/15/43	Joliet	Ill.	186	Supplement No. 14, Agent
Ex Parte 148	Danville, Ill. Intermediate			Raasch's I.C.C. No. 538.
Suspended				
3/14/45	Joliet	Ill.	186	Item 4680-E, Supp. 52,
	Danville	Ill.		Raasch's I.C.C. No. 538.
7/1/46	Joliet	Ill.	197	Supplement 78, Agent
Ex Parte 148	Danville	Ill.		Raasch's I.C.C. No. 538.
Reinstated				
1/1/47	Joliet	Ill.	223	Supplement No. 92, Agent
Ex Parte 162-A	Danville	Ill.		Raasch's I.C.C. No. 538.
5/28/47	Joliet	Ill.	223	Item 4680-G, Supp. 96, Agent
	Danville	Ill.		Raasch's I.C.C. No. 538.
5/28/47	Joliet	Ill.	165	Item 4681, Supp 96, Agent
				Raasch's I.C.C. No. 538.
6/5/47	Joliet	Ill.	165	Suspended by I&S 5499. Supp. 99, Raasch's ICC 538.
10/13/47	Joliet	Ill.	223	Supplement No. 105, Agent
Ex Parte 166	Danville	Ill.	plus 10%	Raasch's I.C.C. No. 538.
1/5/48	Joliet	Ill.	223	Supplement No. 108, Agent
Ex Parte 166	Danville	Ill.	plus 20%	Raasch's I.C.C. No. 538.
5/6/48	Joliet	Ill.	245	Supplement No. 116, Agent
Ex Parte 166-A	Danville	Ill.		Raasch's I.C.C. No. 538.
8/21/48	Joliet	Ill.	268	Supplement No. 120, Agent
Ex Parte 166-B	Danville	Ill.		Raasch's I.C.C. No. 538.
1/11/49	Joliet	Ill.	268	Supplement No. 129, Agent
Ex Parte 168	Danville	Ill.	plus 6%	Raasch's I.C.C. No. 538.
9/1/49	Joliet	Ill.	295	Supplement No. 9, Agent
Ex Parte 168-A	Danville	Ill.		Raasch's I.C.C. No. 659.

(A)

[fol. 81]

EXHIBIT 4

Statement of Rates on Sulphur
Ex Barge to Destinations in Central Territory

From	To		Distance	Rate Per Gross Ton
East St. Louis, Ill.	Danville	Ill.	181	82 95
" "	Decatur	Ill.	107	2 95
" "	Springfield	Ill.	90	2 95
" "	Kankakee	Ill.	220	4 93
" "	Streator	Ill.	196	4 93
" "	Indianapolis	Ind.	236	6 50
" "	LaFayette	Ind.	228	6 50
" "	Terre Haute	Ind.	165	5 82
" "	Crawfordsville	Ind.	217	6 50
Joliet, Ill.	Kalamazoo	Mich.	149	5 38
"	Kendallville	Ind.	151	5 60
"	South Bend	Ind.	98	4 70
"	Fort Wayne	Ind.	157	5 60

Tariff Authority
C.T.R. Tariff 484, I.C.C. No. 2448.
C.T.R. Tariff 483, I.C.C. No. 2447.
C.T.R. Tariff 130-C, I.C.C. No. 3936.
B&O Mileage Tariff I.C.C. 23392.
C&EI Mileage Tariff 3-A, I.C.C. No. 40.
CB&Q Mileage Tariff 9000-D, I.C.C. No. 20147.
CI&L Mileage Tariff 1150-D, I.C.C. 1150-D.
EJ&E Mileage Tariff 106-C, I.C.C. No. 2199.
GTW Mileage Tariff 526-C, I.C.C. A-2960.
GM&O Mileage Tariff 3001-A, I.C.C. No. 130.
IC Mileage Tariff 13131-D, I.C.C. A-11599.
Ill. Term. Mileage Tariff 365-F, I.C.C. No. 8.
NYC&StL Mileage Tariff 264-J, I.C.C. No. 5978.
PRR Mileage Tariff 500-B, I.C.C. 2950.
Wabash RR Mileage Tariff B-15221, I.C.C. 6442.

(B)

[fol. 82]

EXHIBIT 5

Comparison
of
Barge-Rail Costs With All-Rail Rate
From Galveston, Tex. to Danville, Ill.

Barge-Rail Costs		Per G. T.
Waterways Transportation, Inc., Contract Carrier Charge from Galveston to East St. Louis, including transfer from barge to cars		$4.65
Switching at East St. Louis		.40
Rail Charge from East St. Louis to Danville		2.95
	Through	$8.00
Barge Rate from Galveston to East St. Louis Coyle or DCI, New Orleans, La., Federal or American Barge Line		$5.32
Handling Charge at East St. Louis		.44
Rail Charge from East St. Louis to Danville		2.95
	Through	$8.71
All-Rail Rate		
Galveston to Danville, Ill.		$9.18

* * * * * *

Barge-Rail Differentials Under All-Rail Rate ..... $1.18 and 47 cents

* * * * * *

Tariff Authorities:

Agent R. G. Raasch's Tariff I.C.C. No. 659.
Wabash R.R. Tariff I.C.C. No. 7623.
Federal Barge Line Tariff I.C.C. No. 265.
American Barge Line Tariff I.C.C. No. 99.
Agent D. Q. Marsh's Switching Tariff I.C.C. No. 3813.

(C)

[fol. 83] EXHIBIT 6

Statement

Comparing the All-Rail Mileage with the Barge-Rail Distance from Galveston, Tex. to East St. Louis and Danville, Ill., Indicating the Percentage of Circuity of the Barge-Rail Distance Over the All-Rail Distance.

East St. Louis, Ill.		
Short-Line Rail Distance	823	
Via Barge		
Coyle Lines, Galveston, Tex. to New Orleans, La.	363	
Federal Barge Lines, New Orleans to East St. Louis	1155	
	1518	
Percentage of Circuity		84.5
Short-Line Tariff Route Mileage		
Route 15181—T&NO, Shreveport, La., T&P, Texarkana, La., MP RR	850	
Percentage of Circuity		78.6
Danville, Ill.		
Short-Line Rail Distance	977	
Barge-East St. Louis-Rail	1702	
Percentage of Circuity		74.2
Short-Line Tariff Route Mileage T&NO, Shreveport, La., T&P; Texarkana, La., MP, East St. Louis, Wab.	1034	
Percentage of Circuity		64.6

Tariff Authority:

S.W.L. Mileage Tariff 4-E, I.C.C. No. 3926.
Wabash Mileage Tariff B-15221, I.C.C. No. 6442.
Coyle Line Tariff 4, I.C.C. No. 4.
Federal Barge Line Tariff, 9-I, I.C.C. 187.
S.W.L. Tariff 102-W, I.C.C. No. 3862.
C&EI Mileage Tariff 3-A, I.C.C. No. 40.
IC Mileage Tariff 13131-D, I.C.C. No. 11599.
NYC&StL Mileage Tariff 264-J, I.C.C. No. 5978.
Wabash R.R. Mileage Tariff B-15221, I.C.C. 6442.

[fol. 84] EXHIBIT 7

Excerpt From
Supplement No. 1
to

Ill.C.C. No. 1186 Wabash I.C.C. No. 7623

Effective January 12, 1951

Item No.	Commodity	From	To	Rate	Route
970-A Cancels 970	Sulphur (Brimstone), crude ungrounded and unrefined, in bulk. Minimum weight 89,600 lbs. Rates in cents per gross ton of 2,240 lbs.	East St. Louis, Ill.	Danville, Ill.	295	15

* "No switching charges at East St. Louis, Ill. will be absorbed."

* Increase.

[fol. 85] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30731

AMERICAN BARGE LINE COMPANY, ET AL.

v.

CHICAGO AND EASTERN ILLINOIS R. R. CO., ET AL.

Stenographer's Minutes of November 4, 1953

Hearing Room A,
Interstate Commerce Commission,
Washington, D.C.

The above-entitled matter came on for oral argument before the Commission at 10 o'clock a. m.

Present: Chairman Johnson (Presiding), Commissioners Mahaffie, Alldredge, Mitchell, Cross, Knudson, Elliott, Clarke, Freas, and Tuggle.

APPEARANCES:

WESLEY A. ROGERS, P.O. Box 510, Jeffersonville, Indiana, appearing for American Barge Line Co.

NUEL D. BELNAP, 2106 Field Bldg., Chicago 3, Illinois, appearing for Federal Barge Lines, Inc., successor to Inland Waterways Corporation, Complainant.

DONALD MACLEAY, 1625 K St., N.W., Washington, D.C., appearing for Coyle Lines, Inc., and Dixie Carriers, Inc.

JOHN H. EISENHART, JR., 1319 F St., N.W., Washington, D.C., appearing for American Waterways Operators, Inc.

[fol. 85a] JOHN A. DAILY, 122 LaSalle St. Station, Chicago 5, Illinois, appearing for defendants.

[fol. 86] PROCEEDINGS

Chairman Johnson: The Commission will hear argument this morning in No. 30731, American Barge Line Company, et al, vs. Chicago and Eastern Illinois Railroad Company, et al.

I notice 65 minutes for Mr. Belnap, Mr. Rogers, Mr. Macleay and Mr. Eisenhart. I presume you gentlemen have

divided your time among you so we will not have to take charge of that until after 65 minutes have expired.

Mr. Rogers.

ARGUMENT OF WESLEY ROGERS

Mr. Rogers: May it please the Honorable Commission, I am Wesley A. Rogers, representing the American Barge Line Company, a complainant.

Our petition for reopening states the facts in detail.

In aid of understanding, a map has been prepared, showing the various rates and charges via the routes involved.

I will discuss the facts shown by the map from the practical aspect as we believe they create actual discrimination.

Mr. Belnap will discuss the laws applied by the Commission in past cases, and its application to the facts of this case.

Mr. Macleay will discuss the legal aspect of the extension of an existing through route.

Mr. Eisenhart will discuss the matter of the public interest.

[fol. 87] I would like to call your attention to the map:

New Gulf, Texas, in the lower-left-hand corner, designated by the letter "A" is one of the rail shipping points of sulphur which, among other destinations, moves to Danville, designated by point E in the upper right-hand corner.

The all-rail rate via "D", East St. Louis, from A to E, is $9.184 per gross ton.

"B" is the shipping point by water of sulphur from the mines in Texas.

From B to E, via D, St. Louis, or East St. Louis, there is a rate proposed by complainants in this case, of $7.67 per gross ton.

There is in effect a rate from C to E via D, and beyond D, via the lines of defendants in this proceedings, a joint rate of $6.66.

Our proposal of $7.67 is based by the addition of $1.01 to that existing $6.66 rate. The $1.01 represents the difference in the barge-load rate schedules from point B to ports and points served directly by the barge lines along the Mississippi and Illinois waterways.

Under that rate of $6.66, on which we have predicated our

proposal, the railroads accept $2.26 for their service from D to F.

For their service on the all-rail routes, from A to E, via D, and for their service from D to E, they accept some undisclosed figure in the nature of a division, which is not [fol. 88] revealed by the record.

From B to D, East St. Louis, the point of delivery to rail carriers, the barge lines maintain a rate of $5.32. That includes a delivery to the defendants, the absorption by the barge lines of car rental charge and the necessary switch delivery.

The defendants maintain from D to E a rate of $2.95, or a total of $8.27.

We believe that the discrimination in this case appears from the fact that the defendants from D to E maintain at least two and probably three different charges for their service from D to E, one of which is the $2.26 division, that they accept from the barge lines under the through rate from C to F, via D. The other is their local rate, which the record indicates was established by them as a sort of proportional rate to apply on barge traffic, of $2.95.

The third figure is the charge or division that they accept from their railroad connections at D, on traffic moving from A to F, via D.

Commr. Mahaffie: What is the rail rate from A to E?

Mr. Rogers: That is $9.184 indicated on the first line of the map exhibit in the left-hand corner.

In concluding, I wish to stress the fact that this case is a case between two sets of carriers. In connection with this case, we feel that a division of such a rate is of vital im- [fol. 89] portance. We are familiar with the cases which hold generally that divisions are not material in connection with the matter of the establishment of proper rates. However, those cases in the main, I believe, dealt with relations between shippers on the one hand and carriers on the other. Under those cases, of course, the matter of how the carriers divide the rate among themselves is not material, but here we have two sets of rail carriers, by agreement, as to their charge for the same service, eliminating a competing form of transportation with respect to the barge movement from B to D.

Thank you.

Commr. Clarke: Under your proposal who would absorb the unloading charges at point D?

Mr. Rogers: The barge lines.

Chairman Johnson: Mr. Belnap.

ARGUMENT OF NUEL D. BELNAP

Mr. Belnap: If the Commission please, I speak on behalf of Federal Barge Lines, Inc., which is a successor to the Inland Waterways Corporation, a complainant.

I am having laid before Your Honors a table of rates, to which I shall have occasion to refer in the course of my argument. My argument will be primarily confined to the issue which arises under paragraph 4 of Section 3 of the Act, which prohibits discrimination as between connecting carriers and by definition makes a barge line a connecting [fol. 90] carrier of railroads.

In connection with the authorities on which I shall rely, I have for your ready convenience and reference also laid before you an argument memorandum B, with a supplement. The supplement simply indicates I forgot something when I did the first one, which collects the cases on which the complainants rely, in support of their claim for relief under paragraph 4 of section 3.

As stated, that provision in the Act prohibits discrimination as between connecting carriers in the matters of rates, fares or charges.

An issue under that section of the Act raises three questions:

The first question is purely a question of fact, and is, is there a difference in treatment as between connecting carriers in the matter of rates or charges.

The second question is one purely of law. If there is such a difference in treatment in rates and charges as between connecting carriers, does the difference shown constitute discrimination within the meaning of the section in the absence of a showing, an affirmative showing by the defendants of just cause. That is, legitimate reason.

The third question is a mixed question of law and fact. If it be found that there is a difference in rates or charges, that the difference is offensive to paragraph 4 of section 3, [fol. 91] in the absence of a showing of just cause, we then are confronted with the mixed question of law and fact

as to whether the record shows on behalf of the defendants a just cause, a legitimate reason for the difference in treatment.

Addressing myself first to the first question, the question of fact:

There are these differences shown by the record and the differences are not disputed. As Mr. Rogers pointed out, we have in connection with the barge-rail through route, which presently exists, a local rate of $2.95, maintained by these eastern lines, operating from East St. Louis to Danville, and in comparison therewith, they take out of the joint rate with railroads of $9.18, a division, which while the amount is not known, the report does show is lower than the $2.95 local rate.

The second difference in treatment involves this; and I put it on the board, in connection with the barge-rail route. They assess the full combination, $5.32 to East St. Louis, $2.95 from East St. Louis to Danville, a total of $8.27.

In the case of the all-rail through route from Galveston, if they did assess the full combination, it would amount to $11.68, $8.73 fo East St. Louis, $2.95 local rate beyond, a total of $11.68, but they don't assess a full combination when it comes to their favored connections, the southwestern railroads. They participate in a joint rate $2.50 lowgr.

[fol. 92] Commr. Alldredge: Is this correct, to say as you do in your argument memorandum A, in Item 5, that the present combination rate, rail and barge, is a joint rate?

Mr. Belnap: That is from Port Sulphur only. Perhaps it hasn't been made clear that this case involves only rates from Galveston. The rates I have been talking about apply only from Galveston as an origin and from Galveston as an origin I have called your attention to the difference in treatment, the full combination on the one hand and a joint rate $2.50 below the full combination on the other.

Now, Mr. Commissioner Alldredge, the point to which you direct attention from the argument memorandum A brings me to my third differentiation in fact, and that relates to this:

From Port Sulphur, Louisiana, an important shipping point, these eastern railroads join the barge lines in a joint rate of $6.66. They also join the all-rail lines in a joint

rate from that origin. When it comes to Galveston, they join in joint rates with rail lines only. There is that difference in treatment, as between the origins from which these eastern lines, the defendant, maintain this joint rate arrangement.

Now, all of these facts are shown in the recitals in the report of Division 3. None of them happen to be characterized in specific terms in that report as differences in treatment of connecting carriers, with respect to rates or charges, but obviously, as a matter of fact, they constitute just that.

[fol. 93] Commr. Cross: What is the all-rail rate from Port Sulphur, Louisiana, to Danville?

Mr. Belnap: $9.18. The rail lines blanket the two origins. The barge lines do not.

Commr. Cross: I thought that was the all-rail rate.

Mr. Belnap: Maybe I misunderstood you, sir.

Commr. Cross: I said from Port Sulphur, Louisiana, to Danville, the all-rail rate.

Mr. Belnap: $9.18 shown in line 2, column 4.

Commr. Cross: The same as from New Gulf, Texas?

Mr. Belnap: Or Galveston, yes. That is an origin blanket for railroads.

Commr. Mahaffie: Are the shippers at New Galveston or Galveston complaining about this Port Sulphur situation?

Mr. Belnap: The Galveston Chamber of Commerce intervened in support of the complaint. I am not addressing myself, Mr. Commissioner, to the interests of shippers in this adjustment. I am addressing myself purely to the question of discrimination as between connecting carriers, but the Galveston Chamber of Commerce does support the complaint and introduced evidence seeking the joint rate as representative of the port interests.

Commr. Mahaffie: Did they claim Galveston is discriminated against by this Port Sulphur arrangement?

Mr. Belnap: I don't recall whether in terms they said so or not. They seek the joint rate which we propose, so [fol. 94] they would be $1.01 over Port Sulphur, as is the fact in connection with the port to port rates of the barge lines.

Having established, if you please, the difference in treat-

ment as to rates as between connecting lines is a matter of fact, a question of fact, I then come to the second question raised by the issues under Section 3 (4) and that is, are these acknowledged differences in treatment offensive to the prohibition in paragraph 4 of section 3, in the absence of affirmative showing by the defendants of just cause.

On this question of law, the most important question in the case, no light is thrown by the report of Division 3. The report on this point contains nothing but a negative finding, and I read it, from Sheet 4:

> "The record before us affords no basis for a finding of unlawful discrimination under Section 3 (4) of the Act."

There is no reasoning, there is no explanation, there is no why's; there is no wherefore's.

My purpose at this point is to take up each one of these three factual differences in treatment in turn and point out why they constitute a violation of the section.

As I said, this is purely a question of statutory construction, purely a question of law.

First, as to the local rate in the one case, and a division below the local rate in another: Obviously that cannot constitute a violation of Section 3 (4), unless the division of a [fol. 95] through rate is, as a matter of law, a charge within the meaning of Section 3 (4) and on that point, I call to your attention the decision of the full Commission in the Western Pacific case, which is in my memorandum B, in 55 ICC, which case turned squarely on that question of law. That case did not involve issues like this. It involved the question of a difference in divisions as between connecting carriers. The complaint was brought only under Section 3. It was paragraph 2 at that time, but the same provisions as are now in paragraph 4.

At the outset, in determining its jurisdiction and power, it was necessary for the Commission to say whether a division of a joint fare, passenger fares, whether a division of a joint fare is a charge within the meaning of Section 3 of the Act, in so far as that prohibition of discrimination in charges as between connecting carriers.

With two dissents, Commissioners Hall and Daniels, the

Commission held it was. In the opinion of the majority, these are the words:

> "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory."

In the concurring opinion of Commissioner Eastman, he phrased it thus, having pointed out that a division is not collected as such from a shipper or a passenger, that the [fol. 96] rate or fare is collected as a whole, and the collecting carrier in such collection acts merely as the agent of the connecting carriers who finally get the divisions. He said:

> "So that the passenger or shipper is not obliged to make separate payments to each, does not make the division any the less a charge for the service rendered, although perhaps not a charge within the meaning of certain other sections of the Act."

Undoubtedly he had particularly in mind Section 6.

The complainants in this case ask you to reaffirm your holding of law in the Western Pacific case. If that holding of law is reaffirmed, it must necessarily follow that the complainants are entitled to the relief which they seek.

Now I come to the second difference in treatment of connecting carriers in the matter of rates and that is this full combination in the one case, as compared with a joint rate, $2.50 below the combination in the other.

That was also ruled on in the Western Pacific case, if you please, and in the argument memorandum before you are quotes both from the opinion of the majority, the concurring opinion of Commissioner Eastman, in which it was said that if a rail line admits one connection to a joint rate arrangement, without admitting another to an equally as favorable arrangement, that difference in treatment is also a violation of Section 3 (4).

[fol. 97] Commr. Alldredge: On your memorandum B, you quote at the bottom of it from the Western Pacific case, decided by the Commission.

Mr. Belnap: Yes, sir.

Commr. Alldredge: Do you recall whether that was decided before the Act was amended in 1920?

Mr. Belnap: Yes, sir, it was.

Commr. Alldredge: Is the Commission still limited—

Mr. Belnap: The Commission now has greater powers over divisions, but the prohibition in Section 3, as to discrimination as between connecting carriers, has not been changed.

Commr. Alldredge: Is it still right to say that the carrier can make a rate lower than the Commission can prescribe?

Mr. Belnap: No, on the minimum rate. You now have minimum rate authority.

Commr. Alldredge: That is what this quotation says here.

Mr. Belnap: I want to get to that.

There is a question of whether a depressed rate relieves you from power to relieve discrimination. That was the only point I have in this supplement to Memorandum B, is on that point.

Now I want to call your attention to another case in which, as here, there was an existing through route over which the full combination was maintained for one set of carriers, whereas in connection with another set of carriers, via com- [fol. 98] petitive junction, there was less than the full combination. That is the Ann Arbor case; in 136 ICC, involving rates from the east to the west, via Chicago on the one hand, the preferred junction, and via car-ferrying routes through west bank Lake Michigan points where the C. & O. and the N. & W. refused to join in less than the full combination.

There the question was raised that there was no shipper in the case to show public interest. The Commission said that is not necessary. We have here a through route. We have here a difference in treatment as between connecting carriers. That difference in treatment is discriminatory to the extent that the car-ferrying routes are not provided with joint rates on as favorable a basis as the routes through Chicago.

That is an all-rail case.

We have on this very point a leading case involving barge-rail rates, which was brought by the predecessor of Federal Barge Lines, Inc., and that is the U.S. War Department, at the time they conducted these barge operations. It is a case

reported in 92 ICC. It is an opinion by the entire Commission, without dissent. The opinion was written by Commissioner Eastman. The rates involved were sug..r. The barge lines sought additional joint rates on sugar, to correspond with the joint rates, and be differentially less than the joint rates maintained in connection with rail lines via the same junctions.

[fol. 99] The case was brought as a matter of reasonableness as well as a matter of discrimination between connecting lines. At that time, this Commission had no power over barge-rail rates, except to fix maximum rates. The sugar rates were depressed. The Commission held that it was under those circumstances without evidence to prescribe a rate under paragraph 3 of section 15. Consequently, it turned to paragraph——it was then 3, now 4, of section 3, in a carefully reasoned opinion from which I quote at some length in my argument memorandum, it was held that there is discrimination against a connecting barge line, when that line is not admitted to a joint rate structure along with railroads, and the report went considerably further than that. It said that discrimination cannot be cured unless the joint rate with barge lines is made on a differential basis so as to reflect the lower cost and lower value of the service for the barge line haul.

That, please, if I may emphasize it, was said as a requirement in curing discrimination, in violation of Section 3, and I quote the one sentence to illustrate the holding. Commissioner Eastman says, and having reasoned it out carefully:

> "It follows from this that in determining what is necessary in order that discrimination may be avoided, we may require the rail lines which form part of both routes to join in a lower rate over the rail-barge-rail route."

[fol. 100] Now, if you please, I come to my third and final factual difference in treatment as to rates, and that goes to the difference in treatment because we have rates, joint rates, from Port Sulphur, but when we add some barge carriers on the canal in the through routes there are no joint rates from Galveston and yet there is no such limitation in the case of all-rail rates. As to that I will content

myself with simply calling your attention to the Central Railroad of New Jersey case, which in an all rail situation involved a similar and principal set of facts in which the Commission held that that kind of difference of treatment is offensive to Section 3.

Now, if you please, I believe we have established as a matter of law that the differences in treatment shown by the evidence constitute forbidden discriminations, unless they are justified for some legitimate reason, and I have next addressed myself to that question:

My argument seems to run in 3's. There are three matters to be considered and which would seem to be controlling in determining whether these eastern railroads have just cause for this difference in treatment:

First, is their interest in the traffic—just getting the traffic and carrying it;

Second, is the matter of the relative service, depending on which may be the connection; and

Third, is the matter of relative compensation, dependant [fol. 101] on which may be the connection. That is, whether rail lines or barge lines.

As to the interest in the traffic, these eastern lines cannot be legimately concerned with who brings it to them. We appreciate that barge service is offensive to them generally, but when it comes to what they are going to haul, from East St. Louis to Danville, they have no legitimate interest to be served by insisting on a rate structure which confines that traffic to rail lines up to East St. Louis. They get the same traffic no matter who brings it to them.

Now, as to the service, there is no dispute on this record that the service is identical, whether it is brought to East St. Louis by the barge line or whether it is brought to East St. Louis by the Missouri Pacific Lines, from Galveston or New Gulf, Texas.

As to the compensation, the third possible ground for just cause, we contemplate that the railroads will receive out of the barge-rail rate, which you should establish in this case, precisely the same compensation as they receive out of the corresponding all-rail rate, so from the standpoint of compensation, relative compensation, they have no

cause to make effective these differences in treatments of which we complain.

Considering what would seem as a matter of common sense and logic to be the only categories of things, which [fol. 102] could possibly provide facts which would show a legitimate reason, or a just cause, there is nothing in this record—not a word—not a suggestion—from the standpoint of these eastern railroads, to justify what they are doing by way of this discrimination of their connecting lines.

It is possible that Division 3 thought that the depressed rate level afforded some justification, and I would like to take just a minute on that. I would like to have—we would like to have ten minutes for rebuttal if I can, so I am going to have to shorten my argument very sharply, but I would like to deal with this matter of depressed rate level because it is the only fact to which Division 3 makes reference and it didn't make reference in discussing the Section 3 (4) violation. It made reference to that only when discussing its duties under the National Transportation Policy.

I quote:

> "We do not believe, however, that this policy requires us to force rail carriers where they maintain a depressed rate to meet water competition to further depress their earnings on the traffic in order to favor that same form of competition."

Before I get to the significance of that from the standpoint of Section 3, I do want to point out that Division 3 apparently misapprehended the evidence in the case. It treats this rate to Danville as if depressed, in order to [fol. 103] meet water competition.

That is not the fact. There is no water competition to Danville; either from St. Louis or from Texas.

It is true that in 1936 the railroads established a reduced water competitive rate from East St. Louis to Joliet, to compete with Illinois River service. Later, and voluntarily, that rate was established to Danville, but there is no competitive situation at Danville which required them to do that.

Commr. Freas: Right on that point, the report of Division 3 on sheet 3 refers to a rate of $9.17, after adding the $1.50 from the point of extraction. Is that a correct rate?

Mr. Belnap: On sheet which?

Commr. Freas: On sheet 3, the second last paragraph.

Mr. Belnap: Of the report?

Commr. Freas: That is right. It is stated that the rate, "after adding $1.50, is $9.17."

Mr. Belnap: That is a commercial circumstance. It is a question of sulphur originates at New Gulf, Texas, and is $1.50 added to get to Galveston. There is $1.50 incurred before these barge lines touch this traffic in the selling price of sulphur. That is not a circumstance on which we rely. We think it is irrelevant to any question involving discrimination between connecting carriers.

Commr. Freas: Is not that $1.50 added to the $8.27 rate?

Mr. Belnap: It is borne by the traffic. Somebody pays it [fol. 104] some place. They don't pay it to the barge lines, sir. That is true, but we do not consider that circumstance as having any bearing at all on this question of equality of treatment in rates, fares and charges. That is $1.50 that is charged for the local move into Galveston for which these eastern lines are not responsible and we do not ask any relief from them on that account, as far as Section 3 is concerned.

As to this matter I quoted from the report of Division 3. I also want to say that there is no depression in earnings in fact below the all-rail earnings, if this barge-rail rate be established, because, as I have said, we contemplate giving them the same earnings, and when Division 3 used this phrase "further depress their earnings," it was plainly under some sort of a misapprehension, presumably it must have meant to depress their earnings by taking less than $2.95, the local rate, but that goes to the heart of the case under Section 3. No matter whether they have a reduced local rate or what they have, until they give these complainants equality of treatment, with their rail connections, they are squarely in violation of paragraph 4 of section 3, and we earnestly ask Your Honors to so find.

Thank you.

Chairman Johnson: Mr. Macleay.

ARGUMENT OF DONALD MACLEAY.

Mr. Macleay: May it please the Commission, my appear-
[fol. 105] ance is on behalf of Coyle Lines, and Dixie Carriers. They are the carriers that operate between Galveston and New Orleans, over the Gulf Intracoastal Waterway, the red-dotted line on the map visible before you.

For many years these carriers have participated in the through movement of sulphur from Galveston to all points on the inland rivers, Great Lakes, including East St. Louis, and on all joint rates, the differential, Galveston over Port Sulphur, is $1.01; the same $1.01 we ask here be added to the present joint rate from Port Sulphur in order to accord a joint rate arrangement to Galveston.

Mr. Rogers and Mr. Belnap have explained at some length the proposition that the existing rates and practices of the defendant rail carriers constitute discrimination against their water connections in favor of their rail connections.

The carriers for whom I speak are subject to an even more striking type of discrimination. The defendant railroads maintain joint rates with the barge line operating from Port Sulphur through East St. Louis but they refuse to enter into joint rates with the barge lines operating over the Galveston to East St. Louis route, and that is the only part of the route that my clients can participate in.

Commr. Mahaffie: How do you participate, interchange barges at New Orleans?

Mr. Macleay: Yes, sir; it is handled on one factor rates,
[fol. 106] joint rates.

It is our position that the statute flatly prohibts discrimination of this type, in words which permit of no equivocation, and for sound and valid reasons, the basic premise upon which the prohibition of such acts is predicated was stated by the Commission many years ago in the Chattanooga Packing 33 ICC 384 case where it said:

> "If carriers are permitted to apply higher rates for the same service on traffic routed over connecting water lines than on traffic via their all-rail connections, they will be in a position to destroy all water competition, and to deprive shippers of the advantage of their location upon navigable waters."

Your attention has been called to the Mecklin case, where the Supreme Court specifically considered and held illegal discriminations against connecting barge lines resulting from through rate structures of the railroads.

More recently, the same result was reached in the Blue Line case 100 Fed. Supp. 66.

As clear and concise a statement of the meaning and intent of the statutory prohibition against such discrimination as I have ever seen was contained in the dissenting opinion of Commissioner Johnson in the Coast Transportation Company case, Coast Transportation Company against the Aberdeen & Rockfish Railroad Co., 256 ICC 339, where he said:

[fol. 107] "The language of Section 3 (4) is definite and unequivocal. As amended September 18, 1940, it in fact, seems broader and even more definite than prior to that date. The section as previously in effect read 'all carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines,' and by the recent amendment the phrase 'shall not discriminate in rates, fares and charges between such connecting lines' was changed to read, 'shall not discriminate in their rates, fares and charges between connecting lines.' The elimination of the word 'such' undoubtedly broadens the scope of the statute, if indeed it needed broadening, and it must not be overlooked that the term 'connecting line' is now definitely defined as the connecting line of any carrier subject to the provisions of this part, Part I, or any common carrier by water subject to Part III. It is true, as contended by the defendants, that proportional rates are but factors of through charges, but this fact is no warrant for using such a factor as a device for the destruction of competitive transportation agencies. If defendants are permitted to dictate the agency which shall handle their traffic beyond the interchange point, or shall dictate over what carrier that traffic shall reach the interchange point, either through the use of propor-
[fol. 108] tional rates or in any other manner, they have it within their power seriously to hamper, if not eliminate, such of their connecting lines as their fancy may prompt. It seems clear that Section 3 (4) was enacted to prevent just such a possibility."

Commr. Mahaffie: Is that a Commission case?

Mr. Macleay: That was a Division case.

Commr. Mahaffie: What happened to it later?

Mr. Macleay: It was reversed by the entire Commission 286 ICC 439, and the discrimination was ordered removed and we submit that same result should obtain here.

Thank you, sir.

ARGUMENT OF JOHN EISENHART.

Mr. Eisenhart: If it please the Commission, I am appearing on behalf of the American Waterways Corporation. Rather briefly, that is a national trade association of barge lines, operating throughout the United States generally, most of whom are in the area covered by the issues in this case.

I will speak but to one point, with only five minutes, since we wish to reserve the rest of the time for Mr. Belnap.

Under Section 307 (d) which is the public interest section, the first question to resolve is what is the public, in so far as this case is concerned. Obviously, it is the shipper or the receiver or both. Obviously, it is the railroads. Obviously it is the water lines.

[fol. 109] We will take the first group, and it is either the shipper or receiver that is important, depending upon who routes the traffic and has the benefit of the service. It may be both. Generally in sulphur it is the receiver.

Now, unless the barge line position is sustained here, obviously the Danville receiver will be unable to avail himself of barge line service, as a practical matter, in connection with any sulphur originating in the Texas area.

The same thing applies equally with the shipper. The shipper, at Galveston, would be absolutely eliminated as far as this service is concerned.

What about the railroads?

Mr. Belnap has covered that very fully. The barge lines are asking them to take no less than they now take from their connecting carriers. He outlined in great detail the fact that the railroads have no legitimate objection to receiving the same sulphur from the barge lines as it does from its connecting carriers at East St. Louis.

What about the barge lines?

As a practical matter, they are absolutely out. Mr. Macleay's lines, which operate from Galveston to New Orleans, are in a position where they cannot handle a pound of this traffic.

If you thus sustain the railroad position, you are in effect allocating traffic by a practical rate situation, and this [fol. 110] Commission has said many times that that is not their province, and it is being allocated by virtue of a violation of Section 3 (4).

The question of the differential comes into the picture from this standpoint:

This Commission has time after time recognized the disability of service, barge versus rail, and as time has gone on since 1940, when the Transportation Policy was enhanced, the Commission's decisions have more and more recognized their responsibility under the Transportation Policy, and have read it in connection with the substantive provisions of the Act, and given it the weight to which it is entitled.

The limitations on the barge lines are terrific. They have but eight or nine commodities that are available to them—very limited point of origin and discharge, and if you eliminate the points here, you have eliminated automatically at least two barge lines from any participation whatsoever, and you have eliminated a quantity of traffic moving here from the various other barge lines that participate from New Orleans northbound, and we feel—and I am speaking on behalf of the industry generally—that if there was ever a case where the Commission should act under Section 3 (4) and in turn under Section 307 (d), this is the case, for the reason that a limitation on a barge line is very terrific and this is one commodity that if any can be [fol. 111] called natural water-borne commodities, it probably heads the list. It is a commodity that has always moved by water. It originated by water, it moved coastwise originally by water. In fact, even the traffic coming up the Mississippi moved by water into New Orleans, and thence up the river, and therefore, I submit that under the National Transportation Policy, the Commission should find that it is in the public interest to establish the joint through rates here requested.

Thank you.

Chairman Johnson: Mr. Daily.

ARGUMENT OF JOHN A. DAILY.

Mr. Daily: My name is John A. Daily. I represent the defendants here.

In the beginning I would like to direct the attention of the Commission to the fact that this petition for reconsideration in effect abandons such things as the allegations of the unreasonableness of the rates. On page 4, or rather, on page 2, "For the purpose of this pleading the matters of the reasonableness of the rates, the selling policies of the vendors, etc., will not be discussed, and they are all immaterial here.

To some extent I have to *beer* from that.

I might also point out, on page 4, that, on line 4, while they say the existing rates and charges over the barge-rail routes from Galveston to Danville are excessive and un- [fol. 112] reasonable, in violation of Sections 1 (5) and 305 (a) of the Act, as I understand it, the only party having any duty under 305 (a) are the barge lines. They here allege that those rates are excessive and unreasonable. I suggest that they attend to their own knitting, with respect to that section of the Act.

Now, in this case——

Commr. Mitchell: I got the impression the only question involved here was the question of the division.

Mr. Daily: That is not right.

Commr. Mitchell: That the barge lines wanted the same divisions as you now give your connecting railroads, and that was the only question involved.

Mr. Daily: One of their points is they wish to bring divisions into that case which the Commission has consistently refused to do, and correctly so.

Now, it might be well to keep in mind, as we look at the board here——

First, we might say that there is no showing here that the all-rail rate, $9.18, from Galveston to Danville, is unreasonably low. We know it is depressed, and it is a barge competitive rate. Mr. Belnap said something about the rate being first established to Joliet, where the barge does

get in, but Danville takes the same rate under the intermediate clause, and that is how Danville came to—originally came to the $9.18 rate.

[fol. 113] Now in the same vein, there is no showing that the barge-rail combination rate of $8.27 is too high.

Between the present all-rail rate and the present barge-rail combination rate, they have a differential in their favor at present, of 91 cents per gross ton. Thus if the Commission did nothing here, they would still be 91 cents per ton under the all-rail rate.

Commr. Mahaffie: Is it correct they are now moving no traffic?

Mr. Daily: I don't know what the situation is at the present time. Is that what your question is directed to?

Commr. Mahaffie: I suppose you are confining yourself to the record, but were they moving any of this traffic at the time the record was made?

Mr. Daily: At the time the record was made, it is my understanding that the American Barge Line and the Federal Barge Ling were not moving this particular traffic. As far as any other *other* is concerned, I don't know. I may come to that later.

Commr. Alldredge: May I ask, the rates have been cited here in argument and in argument, that seemed to include the increases in Ex Parte 175, but looking at the exhibits of record, it seems that they don't include them. What is the situation?

Mr. Daily: I do not believe that the rates, as stated [fol. 114] in the record, include Ex Parte 175. I don't think so.

Commr. Alldredge: Take the all-rail rate from Galveston to Danville, of $9.184 per long ton. Doesn't that indicate that Ex Parte 175 increases have been added?

Well, you needn't spend any time on it.

Mr. Daily: I generally find that on the exhibits but I don't find it here. If the Commission so wishes we will advise them.

Commr. Alldredge: That is an odd cent there that doesn't usually occur in the regular rate.

Mr. Daily: I see that.

Now, this Commission recently denied a petition for reconsideration in Docket 30792, the Algonquin-Missouri

Chemical case. There was some mention made in the opinion of Division 3 in this case that to some extent the issues in both cases were alike. Certainly they had reason to do so in as much as Mr. Belnap already advised them that they were.

As we pointed out in our reply to the petition for reconsideration, on May 1, 1952, Mr. Belnap addressed a letter to this Commission stating that the issues involved in both of these cases were exactly the same, and that no purpose would be served in arguing the same principles over again.

Now, while as a lawyer I can appreciate the fact that they would like to back-track on that here, as an opposing lawyer I don't intend to let them.

[fol. 115]: In both cases the complaint is almost the same. If you change the names of the defendants and the names of the ports, it is.

Relief is sought under the same sections. The same relief is sought. As a matter of fact, in the Algonquin case, it might have been even a little stronger, because there a shipper was a co-complainant and no shipper at all testified in this case.

I might also mention in that respect that while that letter was written by Mr. Belnap, copies of it were sent to every party of record. So far as I can determine from my own file, none of the other co-plaintiffs took exception to that statement at any time.

Now, in computing these rates, in as much as they have made statements to the effect that they will be driven out of business and not move any of the traffic, it might be well to point out that in these cases, where the barge line asks the Commission to establish a through route, and prescribe a joint rate, that their part of the joint rate remains the same, or goes up. Their local rate is not impaired one bit. Their local rate at present from Port Sulphur to East St. Louis is $4.31. Adding the $1.01 arbitrary, Galveston to Port Sulphur, gives them a rate of $5.32.

Commr. Alldredge: Do you represent the lines beyond East St. Louis?

[fol. 116] Mr. Daily: That is correct, the defendants in this case.

Commr. Alldredge: What objection do they have of accepting the same revenue for hauling this traffic from East

St. Louis to Danville as to whether they get it from the Missouri Pacific or barge line?

Mr. Daily: Because on the traffic which we now have with the Missouri Pacific, that is an all-rail barge competitive rate. That is the reason why it went in, but we have a $2.95 local rate from East St. Louis to Danville, which we expect the others to use.

Commr. Alldredge: I would like to know why, speaking in behalf of those particular roads, why they want more money out of transporting this traffic from East St. Louis to Danville, if it is given to them by a barge line at East St. Louis, than if it is given to them by a railroad?

Mr. Daily: Because we at this time do not have a through route or a joint rate with the barge lines and we have a local rate over which we expect to move part of the traffic.

Commr. Alldredge: Would it not be the same to them if they got the same amount of revenue, no matter what carrier gave it to them?

Mr. Daily: We wouldn't get the same amount of revenue, Mr. Commissioner. We will get a reduction from $2.95 to $2.26 under their proposition, at the same time they are going higher.

Commr. Alldredge: That is on the ground that you are ac- [fol. 117] tually moving traffic by this barge-rail route, isn't it?

Mr. Daily: Yes, sir.

Commr. Alldredge: I thought you said that the record didn't indicate that.

Mr. Daily: The traffic, not from them; the traffic was not from them. I think the record indicates, and we may as well discuss this at this time, that there was a prior movement from Galveston by a contract carrier, and he used the $2.95 rail rate, local rate, but he moved it, as I understand, on a rate of $4.65, his all-water rate—not $5.32.

The difference in there came with a much lower barge rate than is proposed here and when we come to construct this rate, we find that while the barge local rate is $4.31 from Port Sulphur, the division, or the part given to Mr. Belnap, the American Barge Lines and the Federal Barge Lines, yet their proposed division out of the rate they want this Commission to establish is $4.40.

Mr. Belnap: From where?

Mr. Daily: From Port Sulphur to East St. Louis.

Mr. Belnap: That is already in effect, though.

Comm. Freas: I still am not clear on this rate situation. The barge-rail rate from Galveston is $8.27, is it not?

Mr. Daily: Just a moment: From Galveston to Danville.

Commr. Freas: To that you added $1.50 from the point of extraction, is that correct? It is not on the board, but that [fol. 118] is what the record shows.

Mr. Daily: I don't follow you there, sir.

Commr. Freas: The sulphur doesn't originate at Galveston.

Mr. Daily: Now I see what you are driving at. As Mr. Belnap explained and as far as this record shows, that $1.50 is a cost between the Texas men and the Galveston port.

Commr. Freas: What I am coming to is the competitive situation. The $9.27 and $1.50 makes $9.77 rather than $9.14. Now how can it be contended that a rail rate of $9.18 is competitive with a barge-rail rate of $9.77?

Mr. Daily: But the $1.50 you are speaking of is not part of the barge rate.

Commr. Freas: It is part of the charge for moving the sulphur, is it not?

Mr. Daily: The $1.50 is, let us say, due to the fact that instead of having the sulphur at the shore line it is inland some distance, but that is not part of the barge rate. It makes no difference to the barge lines or us, as Mr. Belnap explained, neither one of us gets paid that $1.50.

Commr. Freas: Does the $9.18 rate apply from the point of extraction of the sulphur?

Mr. Daily: Yes, that is correct. That is my understanding, direct from the mines in Southeastern Texas, in the Galveston group. In that connection I might point out that while you asked some time ago about the situation be- [fol. 119] tween Galveston and Port Sulphur, I assume there are like charges or something like that engaged in getting the sulphur to Port Sulphur, to the barge there, just the same as there would be to the barge at Galveston, but as far as I know, that is not a part of the case here today.

Commr. Alldredge: The shipper must absorb that difference.

Mr. Daily: It is my understanding that the Galveston shipper absorbs some of that. I think you may find something to that effect in the record, Mr. Commissioner, but at any rate, it enters into—it doesn't come to us or to the barge lines plaintiff here.

Commr. Alldredge: You say that is not a disadvantage to the water-rail route?

Mr. Daily: Not in the sense that we have before us today.

Commr. Alldredge: It is not an economic disadvantage?

Mr. Daily: An economic disadvantage but not as a question of a rate disadvantage.

Commr. Alldredge: Somebody has to absorb that $1.50.

Mr. Daily: It is my understanding that the shipper does.

Commr. Alldredge: He is willing to do that in order to ship?

Mr. Daily: That is my understanding.

Commr. Alldredge: Thank you.

Mr. Daily: I don't think that quite covers it. I think you will find something to that effect in the record. We [fol. 120] more or less dispense with that today since the point was not made in the petition for reconsideration.

In leaving this matter of building the rates, I think it should be kept in mind that where barge line rates, the barge line division that they want out of this proposed rate, is 9 cents higher than their local rate, 9 cents higher than it was at the time of the hearing, the difference between $4.31 and $4.40, so while we are coming down some 65 or 69 cents, they either stay even or go up.

Now, there is no through rate here today, as the Commission understands it, by barge-rail, Galveston to Danville. As I said before, the prior movement from Galveston was by a contract carrier. He was moving this at a barge rate of $4.65 plus the $2.95 local rail rate.

Commr. Alldredge: Was he exempt from regulation?

Mr. Daily: He paid the $2.95 local rail rate.

Commr. Alldredge: I know but he was hauling a bulk commodity, wasn't he?

Mr. Daily: That is approximately all there is in the record on that situation, Mr. Commissioner.

As far as this record is concerned, and to my own personal knowledge, there has never been any through movement

involving these carriers from Galveston to Danville. Now, in the petition for reconsideration, at page 21, are cited several cases. I will correct that. On page 7—where the [fol. 121] petitioner here talks about the through route being in existence, and he cites the Tomphson case, Thompson v. the United States, at 343 U.S. 549. In that case, the Supreme Court held that there was never any evidence of any through transportation services ever in effect over certain routes to Omaha. These routes were involved in that case. The fact that a physical connection existed meant nothing because a physical connection is pre-supposed, and the fact that each separate carrier had published his joint rates—I should say separate proportional—also meant nothing and the fact that there had been a through movement over a part of that route to points short of Omaha, the Supreme Court held meant nothing when determining whether a through route was in existence directly to Omaha.

Even in the Great Northern case, in the citation, the extracts made there by counsel, it says:

> "The through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes,"

which is certainly not the point here, and without the through route we have no joint rate.

While I was not a part of that case, it is my understanding that in the Rail-Barge Rates, at 270 ICC-591, this Commission made an extensive study of the barge-rail structures, and determined in that case that they would not require joint rates on bulk commodities. I do not believe that today, [fol. 122] where we have a 64 page record in front of us, that the Commission should depart from that principle.

Now, on the question of public interest, as I say, no shipper appeared in this case. The evidence in that respect was second-hand. It was clearly hearsay and the Division regarded it as such.

Where a shipper is truly interested in my short experience before the Commission, I have never noticed any reluctance on their part to come forward and say so, where they wanted a rate structure put in.

As to the barge lines' contentions that they will be driven out of the business, I think we pointed out in our brief at page 12, and if I remember correctly this was a citation from a statement of the Commission, in another barge case, it said that rail originations of sulphur in Louisiana dropped from 112,000 tons in 1945 to 35,000 tons in 1949, while the barge lines went from 309,000 tons in 1945 to 359,000 tons in 1949.

I cannot, in view of those figures, take their allegations seriously on that point.

Now, as the Division had found, this rail rate is presently depressed to meet barge competition; not only the all-rail rate but the local rate of $2.95.

If you will look, as was pointed out by Witness Sweet, at Exhibit 4, for that distance of 181 miles, that rate of $2.95 [fol. 123] is extremely low. In connection therewith, I might point out the rate to Streator, Illinois, of 196 miles, is $4.93. That should certainly indicate that even the local rate is depressed.

Now, on the question of divisions, as this Commission has found throughout very many years, divisions are not a part of a case like this. You do not get to joint rates, fares and charges until you get to a through route, and you do not get to the question of divisions until you get to the question of joint rates, fares and charges, and here we have no through route; we have no joint rate; and the question of divisions is not material to this case. The cases holding that way are legion.

As to the Mecklin case cited by counsel, I think it should be recalled that that involved proportionals only, and that the through rate referred to there by the Supreme Court was a rate composed of a series of combinations. There was no single factor rate involved in that case at all.

Now, it should be clear, I think, that if the complainants' contentions were sustained here, that it would be impossible for the rail carriers, north and east of this point of interchange, to enter into a competitive barge rate in connection with their southern carriers.

If that all-rail line crosses the barge line at any interchange point between origin and destination, then should [fol. 124] their contentions be here sustained, there could

be no such thing as a barge competitive rate, because obviously the barge line will reach that interchange point at a lower rate than the southern railroads, or the southwestern railroads, and if they can take the eastern portion of the all-rail barge competitive rate, the barge competitive rate is not effective any longer. There is just no reason for it.

We pointed this fact out, in answering a motion for a subpoena duces tecum, to compel discovery of divisions in sulphur from Louisiana and Texas to Clinton, 280 ICC 789, and that motion was there denied.

I might say that with respect to that barge line competitive rate, I said it would be impossible unless the southern lines agreed to take all of the shrinkage in their part of the all-rail through rate, but if you do that, then you go against the section of the Act on divisions because you are designing divisions on something else without taking into effect the factors which the Act says shall be considered in the prescription of divisions.

Now, I have in the limited time available gone over some of the cases cited by Mr. Belnap. I think you will find that in most of them they were cases where the through routes and joint rates were already in existence. That is entirely different from the facts in this case. Furthermore, in those cases—in most of them, I would say—the Commission found [fol. 125] where they established the rail-barge joint rates, that they were necessary or desirable in the public interest, and the Division turned that portion down here. They found that they were not necessary, desirable, in the public interest.

As for the Galveston-Port Sulphur carriers, to my knowledge neither the Dixie nor Coyle entered evidence in this proceeding at all. As far as I know, no witness testified on their behalf.

Mr. Eisenhart, I do not know whether he was in the case before, but his remarks were more or less directed to the situation with Coyle and Dixie and the same situation applies. There is no evidence that they are not handling the traffic or that it is hurting them in any respect.

I think that concludes my statement.

Chairman Johnson: Mr. Belnap, are you going to close this argument?

Mr. Belnap: I would like to, sir.

REBUTTAL ARGUMENT OF NUEL D. BELNAP

Mr. Belnap: I would like to straighten out right at the beginning what issue we are discussing here and what relief we ask:

For the purpose of this reconsideration, the barge lines elected to stand on their rights under paragrah 4 of section 3 and that is what we have argued. It also involved an issue under section 15 (3) as to the rates and routes being in the public interest, Mr. Eisenhart is interested in that, [fol. 126] and the barge lines generally, but we have felt we had a square point of law in this case, and we want a reasoned opinion from the Commission upon it, and that is why we confined our argument as well as our petition for reconsideration to that question.

We are not asking the Commission to fix divisions. We are asking you to say, by order, that we must have a $7.67 rate, joint rate, with eastern lines, in order to cure the discrimination.

Commr. Alldredge: May I call your attention to a statement of your witness in the record?

Mr. Belnap: Yes, sir.

Commr. Alldredge: I think it explains how you propose to cure it, and it does bring in this so-called $1.50 we have been talking about.

It appears at page 18 of the transcript, and Mr. Hartman, your witness, says:

> "If a barge-rail rate is established from Galveston, Texas, to Danville, Illinois, on the usual basis of $1.01 cents per gross ton over the rate from Port Sulphur, Louisiana, such bar-e-rail rate would be $7.67 per gross ton. Adding the $1.50 price differential would make the charges via the barge-rail route from Galveston to Danville, $9.17 per gross ton. This rate is to be compared with the presently effective all-rail rate of $9.184 [fol. 127] from Galveston, Texas, to Danville."

Were you trying to equalize the economic advantages?

Mr. Belnap: No, sir.

Commr. Alldredge: Why did you work it back to almost the exact cent?

Mr. Belnap: All we want to do, all we can ask to do in this case is to put in a rate as far as the barge lines are concerned, one is a $1.00 and one is over Port Sulphur. We have canal lines who have to have a cut off this rate, if we give the eastern lines what we believe to be their all-rail division, that is $2.26; we believe it to be the all-rail division because that is the division they take out of the barge-rail rate from Port Sulphur and we don't believe they are taking any less favorable divisions from barge lines than they are taking from rail lines.

If we give them the same division, we can put in that $1.01 over the Port Sulphur rate, it will, in view of that $1.50, which Mr. Freas has asked about, also make an equal rate with the all-rail rate.

Now, as a matter of commercial handling between shippers, at the time this case was tried, the people who sold sulphur from New Gulf, absorbed out of their price that $1.01 rate.

We have argued Section 3—that $1.01 difference, rather —we have argued a question of discrimination, we have laid that $1.50 entirely aside, because we believe it to be irrelevant to any question of difference in treatment as [fol. 128] between connecting carriers.

Commr. Alldredge: You laid it aside after your witness brought in the record, didn't you?

Mr. Belnap: We tried our case, sir.

No, we have not laid it aside up to the time of this petition for reconsideration. We tried our case, as far as the public interest, and the reason throughout we took all of those into consideration, presented them to the Commission, and they were considered by the Examiner.

Commr. Alldredge: What is the real basis for your proposed $7.67 per ton barge-rail rate?

Mr. Belnap: It is $1.01 over the joint rate they maintain with us from Port Sulphur.

Commr. Alldredge: Why did you use $1.01 over the sulphur rate?

Mr. Belnap: That is the prevailing difference as between

Galveston and Port Sulphur on all rates on sulphur. It is the established list for California. We have Mr. Macleay's lines to take care of by way of a division. They won't come in for nothing and there has got to be $1.01 more in the rate because of that canal haul.

Commr. Alldredge: So it was just an incident that it equalized the rate from the initial point of origin?

Mr. Belnap: That is true. That $1.01 has its place in any [fol. 129] rate case or that $1.50 has its place, that cost from New Gulf to Galveston, any place where you are considering the comparison of the whole charge on both sides of the picture, for the purpose of coming to some competitive relation, but here we are only talking about discrimination as between connecting carriers.

Commr. Alldredge: Well, now, do you propose to limit the application of $7.67 to 500 ton——

Mr. Belnap: Whatever the prevailing minimum is.

Commr. Alldredge: 500 tons is the connection.

Mr. Belnap: I think that is so.

Commr. Alldredge: Not per car.

Mr. Belnap: Sulphur you have to barge. You can't distinguish a car. You have a whole load and you take it on the tons that goes in the car.

Commr. All-redge: You are proposing a 500 ton limit, or minimum.

Mr. Belnap: Yes, that is what we have. We have many rates with these rail lines, not only on sulphur but on salt, ores, steel, in which there is a minimum for the barge portion of the haul, which is 200, 500, 1,000 tons, and then at the point of interchange, the carload minimum applies. That is a recognized part of barge rail rate structures on these commodities which can move and do move in barge loads. We have them all through our rate structure.

[fol. 130] Commr. Alldredge: Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?

Mr. Belnap: No, we are asking for joint through rates, and urge you that that is the necessary step to remove the discrimination demonstrated.

Commr. Alldredge: If the Commission required the rail-

roads to establish beyond East St. Louis a proportional rate——

Mr. Belnap: Equivalent to their division, that would be one method of curing the thing about which we complain but that isn't the relief we have asked. I don't believe that is really one of the issues of our complaint because our complaint asks for through, joint through rates to cure the discrimination.

Now, on this point——

Commr. Alldredge: You haven't got any general prayer for relief?

Mr. Belnap: Yes, we have such other relief as may seem proper, but now Mr. Daly, I don't know what his point is, but he says there is no through route in existence. If he is right let me point out that then you simply have a case of route and rate discrimination as well, and when he said that these cases I cited to you, under Section 3 (4), there were already through routes and joint rates in effect, he is [fol. 131] badly mistaken except that Ann Arbor case in which there was an existing through route, but all those Section 3 (4) cases, other than the Ann Arbor case, involved a requirement that through routes and joint rates be established in order to cure discrimination, every one of them, and I sent my argument memorandum last week—Mr. Daly didn't get it until Monday—I sent it to Mr. Daly so he would know the cases on which I was going to rely but he is completely mistaken in telling you what was involved in those cases. As I said, if there is no through route, as he claims, then you simply have the ordinary case of through route as well as joint rate discrimination, the same thing that was before the Commission in the United States—War Department case, in 92 I.C.C. from which I have quoted at considerable length, because there the Commission said, as to the route and as to the rate, you have got to join these barge lines and you have got to make the rate on a differential basis and you have got to do that to comply with paragraph 4 of section 3. That was the entire basis for the decision.

Commr. Alldredge: All right. Under those precedents what the Commission really looks at in the final analysis is the differential between the barge-rail route and the all-rail route from Galveston, doesn't it?

Mr. Belnap: Yes. You have to say that such and such a differential rate is required to cure the discrimination.

Commr. Alldredge: What is your differential that you arrive at under your proposal?

[fol. 132]

Mr. Belnap: It is on my Memorandum A, it is $1.51. It is $1.514.

Commr. Alldredge. Per gross ton?

Mr. Belnap: Per gross ton. You see that would be, Mr. Commissioner Alldredge, that would be in relation to the differential in the port to port rate from Port Sulphur, or from Galveston, exactly the same as the Danville differential is in relation to the port to port differential at East St. Louis, when from Port Sulphur.

I call your attention, if you will look at line 4, column 2, 442, line 6, column 4, 252, that is our differential, first at East St. Louis, then at Danville, from Port Sulphur. The Danville differential is $1.90 less than the East St. Louis differential, because we have these rail services beyond and the spread in rail rates as now.

Now, if you will look at line 4, column 3, it is a 341 differential, port to port at East St. Louis from Galveston. We may have had $1.51 at Danville, we will have $1.90 lesser differential, which makes us completely consistent with the Port Sulphur adjustment in which these railroads now voluntarily participate.

I would like to say a word about the Algonquin case which was decided by Division 3 and in which the entire Commission denied a petition for reconsideration.

[fol. 133]

Looking backwards, I think we very definitely made a mistake in not pressing upon the Commission the same questions under Section 3 (4) in that case as we did here. That case had the same issues. It involved a question under Section 3 (4); Division 3 decided against the barge lines primarily on the ground that in the general public interest, or that there had been no demonstration of public interest to show sulphur ought to move by barge-rail and by all-rail particularly as it might affect the New Orleans lower cost which is the only line serving Port Sulphur, Louisiana.

We in our petition for reconsideration undertook to meet Division 3 head-on, on that proposition, and urge you that the Division had made a mistake in the circumstance on

which it relied in finding there was no public interest, while the issue was under Section 3 (4), unfortunately, we didn't press it in that case, but we are pressing it in this case, we are relying on it 100 per cent in this case.

Commr. Mahaffie: What is the reference to that Algonquin case?

Mr. Belnap: 30792. I don't know the volume and the page.

Mr. Knudson: You say you rely, Mr. Belnap, exclusively on Section 3 (4). Do you mean that the other considerations, some of which were set forth at least in the dissent in the primary case, should be brushed aside now?

[fol. 134] Mr. Belnap: No, sir.

Let me say it this way: From the standpoint of the barge lines, we wanted very much to have a completely reasoned opinion from the Commission on this interpretation of Section 3 (4), particularly as applied to a situation of this kind. We thought we could achieve that best by confining our petition and our argument to that point.

Now, Mr. Eisenhart has argued that general public interest. The barge lines have not abandoned any part of our complaint. We simply insist that regardless of what might be the finding as to reasons, or as to whether there was adequate proof of public interest, there is a definite interest, clear case, as a violation of Section 3 (4), as a matter of both fact and law, and we urge a decision of the Commission on that point.

But there is no abandonment in the sense we dismiss or anything like that.

As far as 26712, the General Barge-Rail case, where the Commission as a matter of reasonableness held it would not prescribe any rates on bulk commodities, I call your attention to two things:

In the first place, in that case, the barge lines did not propose any joint rates on commodities moving subject to barge load minimum. That case was entirely a carload and l. c. l. quantity case, from the standpoint of the barge-rail rates which were discussed before the Commission.

[fol. 135] Secondly, the reason given in the Commission for not fixing some joint rates on commodities moving in bargeload quantities, was that most interior points couldn't receive it.

Of course, that fact is not true here. Danville is in a position to receive the sulphur in the lots that would apply under these rates, and the only reason mentioned in 26712, on the question of reasonableness, does not apply to the instant case.

Now, I listened in vain for Mr. Daly to tell us some legitimate reason from the standpoint of his railroad, the New York Central, for failing to treat his barge line connections like he does the Missouri Pacific. He talks about the rail originations dropping. That is of no concern to the New York Central Railroad, unless they want to combine with their southwestern connections to try to put the barge lines out of business. The only time it becomes of interest to Mr. Daly's railroad, as to what happens to the Missouri Pacific, is when he wants to run the barge line entirely out of business.

In so far as his legitimate selfish interests are concerned, the New York Central Railroad, if he gets this traffic via barge, he gains just as much, his whole railroad is just as well off, as if he got it from the southwestern connections, and that is true whether his rate is depressed or not. If he elects to join in the Missouri Pacific, on a rate less [fol. 136] than a normal rate, and out of that rate take a division less than his local rate, he hasn't got a leg to stand on, when he comes here and tries to justify that difference in treatment as not being a violation of Section 3 (4) and I call your attention that on the question of law, which we tried to discuss with you, he didn't cite a single case, he didn't give you a single reason opposed to those which we have presented in support of our case in chief.

Thank you.

Chairman Johnson: The case will be taken under advisement.

The Commission will adjourn.

(Thereupon, at 11:32 o'clock a. m., the above matter was submitted, and the Commission adjourned.)

[fol. 137] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 10, 1955

Appeal from the United States District Court for the Southern District of Texas

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 10, 1955.

(5357-9)

The Questions Presented Are Substantial

On the first question, the application of the non-discriminatory requirement of Section 3(4) to the charging by a railroad of a local rate on traffic received from a water carrier connection which is higher than the division which it accepts as compensation for its identical services on traffic received from a rail connection; the Commission attempted to distinguish this case from the principles which it had enunciated with reference to discrimination as between *rail* connecting carriers, and from those enunciated by the Supreme Court with reference to discrimination as between rail and water carriers, in words which clearly illustrate the basis for its ultimate conclusion:

> "The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pacific R.Co.* v. *Southern Pac. Co.*, 55 I.C.C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements be-